

GAHC010192902021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./263/2021

BASIRAN BEWA, W/O LATE SARIF UDDIN SK
VILL- HAH CHORABORI, PUKHURIPARA
P.O. SESAPANI, P.S. MATIA
DIST. GOALPARA, ASSAM
PIN-783134

-VERSUS-

THE STATE OF ASSAM AND 7 ORS
REP. BY THE ADDL. PP, ASSAM
2:ABDUL SOBUR @ ABDUL SOBUR MOLLAH
S/O AKKEL ALI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI
P.S.MATIA
DIST. GOALPARA
PIN-7883134

3:SOFIQUL ISLAM
S/O AKKEL ALI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI
P.S.MATIA
DIST. GOALPARA
PIN-7883134

PIN-7883134

4: NUR BOX

S/O LATE AHAD ALI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI
P.S.MATIA
DIST. GOALPARA
PIN-7883134

5:MOSLEM UDDIN
S/O ASHEK ALI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI
P.S.MATIA
DIST. GOALPARA
PIN-7883134

6:NUR ALOM
S/O ABDUL HAI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI
P.S.MATIA
DIST. GOALPARA
PIN-7883134

7:SIDDIQUE ALI
S/O ISHAK ALI
VILL- HAHCHARABORI
PUKHURIPARA
P.O. SESAPANI, P.S.MATIA
DIST. GOALPARA
PIN-7883134

8:HITESH DAS
S/OLATE TILAK DAS
VILL- UPAR BAGUAN P.O. SESAPANI
P.S. MATIA, DIST. GOALPARA
PIN-783134

Advocate for the Petitioner : MR HRA CHOUDHURY, SR. ADV.
MR. A ROSHID, ADV.

Advocate for the Respondent : MR M K HUSSAIN, ADV. (R-2 to 8)

BEFORE
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of hearing: 01.02.2022.

Date of judgment: 15.02.2022.

JUDGMENT AND ORDER (CAV)

Present revision petition is preferred against the impugned order dated 30.10.2021, passed in Sessions Case No. 128/2018, whereby the learned Additional Sessions Judge has rejected the prayer of the petitioner to invoke the Section 319 CrPC to summon the 7 (seven) nos. of persons as additional accused to face the trial.

2. I have heard Mr HRA Choudhury, learned Senior Counsel, assisted by Mr A Roshid, learned counsel for the petitioner. Also heard Mr M K Hussain, learned counsel for the respondent Nos. 2 to 8, and the learned counsel for the State respondent No. 1.

3. The petitioner, herein, as an informant lodged an FIR dated 04.05.2014, against 24 nos. of accused persons and others named in the FIR, alleging that they trespassed into the house of the informant with weapons in their hands and tried to kill the petitioner to which she escaped and thereafter, the FIR-named accused persons looted away cash amount of Rs. 50,000, gold ornaments and also burnt down her house by pouring kerosene oil. On the facts, Matia PS Case No. 65/2014 under Section

120(B)/147/148/448/384/436/427/506 IPC was registered and after completion of the investigation, charge sheet was laid on 12.05.2016. The case proceeded for trial and after examination of all the witnesses and recording of statement of accused under Section 313 CrPC, the informant/petitioner through Public Prosecutor, filed a petition under Section 319 CrPC, as aforesaid, as the said respondents were not sent up by Police in the charge sheet. Learned trial Court after hearing both the parties, and considering the matters on record, rejected the petition, primarily on the grounds that except the informant/PW-1 and her brother/PW-8, none of the witnesses, supported the facts that these seven accused persons were also present with other accused persons, and the said PW-1 and PW-8 also did not state the same before the IO during investigation and their statement is contradictory, and thirdly the petition was filed at the last stage of the trial, when statement of the accused person under Section 313 CrPC (except one) has been recorded and there is no merit in the petition.

4. It is the contention of the petitioner that while accepting the charge sheet, no notice was issued to the informant, which is bad in law and during the course of trial, the petitioner/informant has stated the names of all above 7 (seven) respondents that they along with other accused persons committed the offence and she saw the incident.

5. Reliance has been placed upon the recent decision of Hon'ble Supreme Court in Criminal Appeal No. 875/2021 (*Manjeet Singh –*

Vs- State of Haryana), wherein specific guidelines have been issued as to under what circumstances, the Court can invoke the power under Section 319 CrPC. In the said decision, the Court has summarized all the findings of the earlier decisions and the law laid down in *Hardip Singh –Vs- State of Punjab*; (2014) 3 SCC 92, *Md Isphani –Vs- Jogendra Chandak*; (2017) 16 SCC 226, *Rajesh – Vs- State of Haryana*; (2019) 6 SCC 368 and the recent decision in the case of *Sartaj Singh –Vs- State of Haryana*; 2021 (4) Scale 227 and has held as below:-

“13. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:

(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pretrial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under

Section 319 CrPC and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not has to wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the 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 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 (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.”

6. Relying on the aforesaid decisions, learned counsel for the petitioner submits that the learned trial Court erred in law in rejecting the petition only because of the delay in filing the same and other reasons, whereas, in view of the law laid down by the Supreme Court, such a petition can be filed at any stage of the trial.

7. On the other hand, the learned counsel for the respondent

Nos. 2 to 8 has submitted that the learned trial Court has rightly passed the order, inasmuch as the evidence on record fall short of the satisfaction to suggest a *prima facie* case against those accused persons. Reliance has placed upon the decision of the Hon'ble Supreme Court in *Brijendra Singh & Others –Vs- State of Rajasthan;* (2017) 7 SCC 706 (Crl. Appeal No. 763/2017), *Labhuji Amratji Thakor & Others –Vs- State of Gujarat;* (2019) 12 SCC 644 (Crl. Appeal No. 1349/2018), *Shiv Prakash Mishra –Vs- State of Uttar Pradesh;* (2019) 7 SCC 806 (Crl. Appeal No. 1105/2018), wherein it has been held that standard of proof necessary for summoning a person as an accused under Section 319 CrPC is higher than the standard of proof required in framing of charge and the power under Section 319 CrPC should be exercised sparingly and merely because, some witnesses have mentioned the names of such persons or that there is some material against that person, the discretion under Section 319 CrPC, should not be used by the Court. The ratio laid down in *Hardip Singh(supra)* has also been reiterated in the said decisions. It has been held that only where strong and cogent evidence occurs against a person from the evidence laid before this Court that such power should be exercised, otherwise, it is not to be exercised in a casual and cavalier manner.

8. I have duly considered the submissions of learned counsel for both the parties and carefully gone through decisions relied upon by both the parties.

9. In view of the ratio laid down in the aforesaid decision, there

is no denial that power under Section 319 CrPC can be exercised by the learned trial Court at any stage during the trial to summon any person as an accused to face the trial if it appears from the evidence that such person has committed any offence, for which such person could be tried together. There is however, line of caution that it should not be used mechanically, but only when there is strong and cogent evidence on record to form a *prima facie* opinion, than the mere probability or complicity.

10. Turning to the present case in hand, it is found that although PW-1 and PW-8 and also to some extent, other PW-3 and PW-4 also stated the fact that all the accused persons committed the offence (without naming any accused person), but the statement of those witnesses have been contradicted by the IO/PW-7, that those witnesses, PW-1, PW-2, PW-3 and PW-8 never disclosed before the IO about the presence of those accused persons and thus, the IO has contradicted the evidence of all above relevant witnesses. That being so, as of now, their evidence cannot be taken as a convincing *prima facie* evidence, against the accused persons, intended to be arrayed as an accused. Had it been a fact that such petition was filed much prior to the evidence of IO, situation may have been on a different footing. But as a matter of record, examination of all the witnesses, including the cross-examination has been completed and the defence has challenged their presence at the time of occurrence by way of suggestion and such suggestion has been proved through the IO, thereby testimony of vital witnesses has

been contradicted by the IO. In the given circumstances, testimony of IO will prevail and as such, adding of other person as an additional accused at the fag end of trial, (who were not charge sheeted) is of no consequence.

11. In the light of the above principles, considering the present case, having regard to the contradictory statements of the witnesses and other circumstances, this Court is of the considered view that the learned trial Court has rightly held that respondent Nos. 2 to 8 cannot be summoned as accused. Although the names of those accused persons were mentioned in the FIR, but finding no material against them, Investigating Officer has not sent up those persons to face the trial at the time of filing charge sheet and the petitioner's side never challenged such finding of the IO before the Court at any point of time and has filed the petition at the fag end of the trial, where even the statements of the accused persons under Section 313 CrPC have already been recorded. Law is settled that much stronger evidence than the mere probability is required, which is more than a *prima facie* case at the time of framing of charge to invoke the provision under Section 319 CrPC.

12. In the instant case, evidence brought on record during trial does not *prima facie* show the complicity of the respondents, herein, and in view of the serious contradiction of relevant witnesses, proved by the IO, the learned trial Court is justified in refusing to invoke the provision of Section 319 CrPC.

13. There being no error in the impugned order dated

30.10.2021, passed by the learned trial Court, no interference is called for. Accordingly, revision petition lacks merit and stands dismissed.

JUDGE

Comparing Assistant