

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No. 885 OF 2019
(Arising out of SLP (Crl.) No. 9063 of 2017)

SUKHPAL SINGH KHAIRA

...APPELLANT (S)

VERSUS

THE STATE OF PUNJAB

...RESPONDENT (S)

with

CRIMINAL APPEAL No. 886 OF 2019
(Arising out of SLP (Crl.) No. 9150 of 2017)

JOGA SINGH AND ANOTHER

...APPELLANT (S)

VERSUS

THE STATE OF PUNJAB

...RESPONDENT (S)

ORDER

1. Leave granted.
2. These Criminal Appeals are filed against the impugned judgment and order of the High Court of Punjab and Haryana, dated 17.11.2017, passed in Criminal Revision No. 4070 of 2017 and Criminal Revision No. 4113 of 2017, wherein the High Court

dismissed the Criminal Revision Petitions and upheld the order of the Trial Court summoning the accused-appellants herein, under Section 319 of the Code of Criminal Procedure, 1973 [*hereinafter* '**CrPC**' for brevity].

- 3.** The factual narration of this case is that on 05.03.2015, a First Information Report was lodged in the Police Station Sadar, Jalalabad against eleven accused for the offence committed under Sections 21, 24, 25, 27, 28, 29 and 30 of the Narcotic Drugs and Psychotropic Substance Act, 1985, Section 25-A of the Arms Act and Section 66 of the Information Technology Act, 2000. Initially, under the 1st charge sheet dated 06.09.2015, ten accused were summoned and put to trial in Sessions Case No. 289 of 2015. Even though a second charge sheet was filed by the police, the same did not name the accused-appellants herein.
- 4.** Subsequently, on 31.07.2017, the prosecution filed an application under Section 311 of CrPC for recalling PW-4 and PW-5, which came to be allowed. On such recall the aforesaid witnesses named the accused-appellants herein. Thereafter, the prosecution filed an application under Section 319 of CrPC in Sessions Case No. 289 of 2015 for summoning additional five accused (including the present

appellants herein) by placing reliance on statements of PW-4, PW-5 (recalled witnesses) and PW-13.

5. On 31.10.2017, the Sessions Court first pronounced the judgment in Sessions Case No. 289 of 2015, convicting the nine other accused put on trial. On the same day, by a separate order the Sessions Court, while allowing the application of the prosecution, summoned accused-appellants herein under Section 319 of CrPC. Aggrieved by the summoning by the Sessions Court, the accused-appellants, filed separate Criminal Revision Petitions, in the High Court of Punjab and Haryana, being Criminal Revision Nos. 4070 and 4113 of 2017. The High Court by the common impugned judgment, dismissed the Criminal Revision, and upheld the summoning order passed by the Sessions Court.
6. Aggrieved by the impugned judgment and order of the High Court, accused appellants have approached this Court through these Special Leave Petitions.
7. Heard learned counsels appearing for both parties. Mr. P. S. Patwalia, learned senior counsel appearing on behalf of the accused-appellant in SLP (CrI) No. 9063 of 2017 contended by relying upon the **Hardeep Singh v. State of Punjab**, (2014) 3

SCC 92 to state that, the power under Section 319 (1) CrPC can be exercised at any time after the filing of the charge-sheet and before the pronouncement of the judgment. In the present case, the aforesaid summoning order passed after the order of conviction is in clear breach of the principles laid down in the **Hardeep Singh Case** (*supra*). The counsel further contended that when the **Hardeep Singh Case** (*supra*), has clearly prescribed the stage at which an application under Section 319 Cr.P.C, can be entertained, the aforesaid violation is not merely procedural but is rather a substantial one. Lastly, the counsel contended that the moment the trial is concluded and the matter is reserved for judgment, then the stage for exercising power under Section 319 CrPC, ends and the court becomes *functus officio*.

8. Mr. V. Giri, learned senior counsel appearing on behalf of the accused-appellant (in SLP (Crl) No.9150/2017), while generally supporting Mr. Patwalia has submitted that the order summoning the appellants herein was passed simultaneous with the order of conviction of other accused. The counsel submitted that Section 319 (4) Cr.P.C, has to be read along with Section 319 (1)- which provides that the new person has to be tried together with the

accused. This principle is based on the “*commonality of evidences*”. But in the present case, allowing such application under Section 319 Cr.P.C, goes to the root of fair trial, as the court has already considered such evidence and has proceeded to speak on it. It is the same evidence which would be reappreciated, and the inclusion of such evidence vitiates the principles of fair trial.

9. Mr. Harin P. Raval, learned senior counsel appearing on behalf of the respondent State in SLP (Crl.) No. 9063 of 2017 argued that even if it is assumed that the summoning order was passed subsequent to the conviction order, the relevant consideration is that application of mind was within the prescribed time limit under Section 319 of Cr.P.C. The process of application of mind and pronouncement of summoning order are separate under Section 319, Cr.P.C, and it is the time of application of mind which is relevant. The counsel further drew our attention to the fact that undisputedly, the application under Section 319 CrPC was filed and heard during the pendency of the trial, and the order thereon was reserved. In this context, the counsel submitted that, the application under Section 319, Cr.P.C was separated from the trial by the direction of the High Court so as to complete the trial expeditiously in a time bound manner. Now the aforesaid fact

cannot be used to prejudice the case of the State. Lastly, the counsel maintained that the summoning order under Section 319, CrPC was passed on the same day, simultaneously, along with the final judgment convicting the other accused. Therefore, there is no procedural irregularity committed. Moreover, he emphasized that the trial in this case could not be said to be completed unless a decision was given in respect of all the accused fully. This submission was based on the fact that the trial had been bifurcated and was pending in respect of the other absconding accused, which would sustain the exercise of power under Section 319.

10. Mr. Sidharth Luthra, learned senior counsel appearing on behalf of the respondent State in SLP (Crl.) No. 9150 of 2017, while supporting the arguments made by Senior Counsel Mr. Harin P. Raval, further submitted that it is settled law that procedural laws must be liberally construed to render justice. Moreover, assuming but not admitting that an irregularity in the exercise of power under Section 319 Cr.P.C was committed by the Trial Court, the same would not vitiate the proceedings. The counsel concluded his arguments by stating that the finding of the trial court cannot be reversed under Section 465 CrPC as the appellant has not made out a case of failure of justice.

11. In light of the facts and arguments presented before us, the following questions arise for our consideration: -

- I. Whether the order of the Sessions Judge summoning the appellants herein as additional accused was in breach of Section 319, CrPC?
- II. If the answer to the above question is in the affirmative, could the order of the courts below still be sustained under the Code?

12. At the outset, it is pertinent to note that Section 319 Cr.P.C reflects two important objectives; *firstly*, the Courts duty to bring home the guilt of all the accused and render complete justice and *secondly*, the duty of the State to take every criminal prosecution to its logical end. This Court in a catena of judgments has defined Section 319 CrPC as an enabling provision, especially in the circumstances where the investigating agency had failed to array any person as an accused. This provision empowers the courts for calling such persons to face the trial. The Section stipulates that a 'Court' may summon any additional accused if it appears from the 'evidence', during the course of any inquiry or trial, that such an individual, not being an accused, has committed any offence for which such person could be tried together with the named accused. Sub-section 4 of Section 319 of CrPC indicates that the proceeding

with respect to the summoned individual, as per Clause (1) of Section 319 of CrPC, may be *de-novo* or joint trial.

13. The appellants have argued for a comprehensive reading of Section 319 (1) CrPC, wherein the aspect of application of mind by the judge as well as the pronouncement of the final order are both bound by the prescribed time limit. They have extensively relied on the **Hardeep Singh Case**, to point out that the trial court was *functus officio* and did not have the jurisdiction to deliver the order of summoning.

14. The High Court while repelling the contention of the appellants that the trial court was *functus officio* when the summoning order was passed, placed reliance on the factual matrix explained later, in **Shashikant Singh v. Tarkeshwar Singh**, (2002)5 SCC 738, and noted that the decision in **Shashikant Singh Case** (supra) was on the same point rather than **Hardeep Singh Case** (Supra).

15. In **Shashikant Singh Case** (supra), this Court was concerned with a unique situation, the question which was before the Court therein was-

“Can a person summoned pursuant to an order passed by a court in exercise of power conferred by Section 319 of the Code of Criminal Procedure, 1973 (the Code) be tried for the offence for which he is summoned **after the conclusion of the trial wherein such an order of summoning was passed**, is the question that falls for determination in this appeal?”

(emphasis supplied)

16. While answering the same, the 2 two Judge Bench in ***Shashikant Singh Case*** (supra) held as follows:

9... 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.

...

11. **The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together with the accused is directory.**

(emphasis supplied)

17. The High Court has placed extensive reliance on the factual matrix of ***Shashikant Singh Case*** (supra), to draw parallels between the similarities in both cases. The summoning order in former case was passed before the trial had ended, whereas in this case it is passed

after the trial has ended *viz.* after passing of the judgment in Sessions Case No. 289 of 2015. Therefore, this Court while dealing with the ***Shashikant Singh Case*** (*supra*), interpreted the law based on the facts available therein, whereas the present case has a different context altogether.

18. In this context it is important to note that, when ***Hardeep Singh Case*** was heard by the two-Judge Bench [(2009) 16 SCC 785], this Court took note of the holdings in the ***Shashikant Singh Case*** (*supra*). The two-judge bench observed that:

32. In *Shashikant Singh v. Tarkeshwar Singh* [(2002)5 SCC 738: 2002 SCC (Cri) 1203], during the pendency of trial of an accused, another person was summoned by the trial court under Section 319 of the Code. But by the time he could be brought before the court, the trial against the accused was over. **It was held by this Court that the words “could be tried together with the accused” in Section 319(1) were merely directory and if the trial against the other accused is over, such a person who was subsequently added as an accused, could be tried after the conclusion of the trial of the main accused.**

(emphasis supplied)

19. Taking note of the above the two-Judge Bench in ***Hardeep Singh’s Case*** referred the matter to a three-Judge Bench on the following questions-

“(1) When the power under sub-section (1) of Section 319 of the Code of Criminal Procedure, 1973 of addition of the accused can be exercised by a court? Whether application under Section 319 of the Code is not maintainable unless the cross-examination of the witness is complete?”

(2) What is the test and what are the guidelines of exercising power under sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the court is satisfied that the accused summoned *in all likelihood* would be convicted?”

(emphasis supplied)

20. Subsequently, this Court in the aforesaid matter of ***Hardeep***

Singh's Case (*supra*) laid down the scope and extent of the powers of the Court in the criminal justice system to array any person as an accused during the course of trial as per Section 319 Cr.P.C.

The questions which were reformulated by the larger Bench were-

(i) What is the stage at which power Under Section 319 of the Code of Criminal Procedure, 1973 can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) of the Code of Criminal Procedure, 1973 could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination- in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) of the Code of Criminal Procedure, 1973 has been used in a comprehensive sense and includes the evidence collected during investigation or the word

"evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power Under Section 319 of the Code of Criminal Procedure to arraign an accused? Whether the power Under Section 319(1) of the Code of Criminal Procedure, 1973 can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power Under Section 319 of the Code of Criminal Procedure, 1973 extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

(emphasis supplied)

21. We note that the difference of formulation in the reference questions and the final order of the Constitution Bench with respect to the Question no. 1, makes a difference with regard to the present case. It is precisely the gap, between the restricted re-formulation of the 'Question no. 1' by the Constitution Bench and the 'Question no. 1' in the reference order of the *Hardeep Singh Case*, which these unique facts fit into. The earlier 'Question no.1' in the reference Order was broader in comparison to the 'Reformulated Question no. 1' by the Constitution Bench. It is this marginal area which is a *sub-silentio*, that needs to be referred to a larger Bench again.

22. In the **Hardeep Singh Case** (*supra*), the Constitution Bench set out to answer the questions referred above. In this part we are mostly concerned with the first question. The Court, while assessing the ambit of the term ‘trial’, was concerned with the stage during which the power under Section 319 of CrPC could be exercised, in this regard, it was held-

“Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Code of Criminal Procedure can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Code of Criminal Procedure, committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind.”

(emphasis supplied)

23. It was contended that the question of law herein is unique to the present case, and the earlier judgment of **Hardeep Singh** (*supra*) did not have an opportunity to cast any light about the validity of summoning orders pronounced after the passing of the judgment. They further argued that, the **Hardeep Singh Case** (*supra*), treats

Section 319 in an isolated manner without taking into consideration the spirit and the mandate of the Code.

24. To strengthen the aforesaid submission, the State further contended that Section 465, Cr.P.C was introduced to provide for a balanced mechanism under the Criminal Justice System and to stop the Courts from getting into hyper technicalities and committing serious violations. This Court in **Hardeep Singh Case** (supra) has not considered the above principles or the issues which could possibly arise before the trial court while dealing with applications under Section 319, Cr.P.C. The State therefore submitted that, Section 319, Cr.P.C. should not be treated as an isolated island and should instead be given a pragmatic interpretation by keeping in view the entire mandate of the Code to render complete justice.

25. Furthermore, it needs to be determined whether the trial is said to be fully concluded even if the bifurcated trial in respect of the absconded accused is still pending consideration.

26. The appellant herein contended that, the observations made in the **Hardeep Singh Case** (supra), cannot be diluted by a Bench of this strength. We have considered the averments made by the counsel

on behalf of both parties, we feel that it would be appropriate to place the same for consideration before a larger Bench. However, we are of the considered opinion that, power under Section 319, Cr.P.C being extraordinary in nature, the trial courts should be cautious while summoning accused to avoid complexities and to ensure fair trial. We must remind ourselves that, timely disposal of the matters furthers the interest of justice.

27. After pursuing the relevant facts and circumstances, the following substantial questions of law arise for further consideration-

- I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?
- II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?
- III. What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C?

28. In light of the same, we direct the Registry to place these matters before Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength for considering the aforesaid questions.

..... J.
[N.V. Ramana]

..... J.
[Mohan M. Shantanagoudar]

New Delhi;
May 10, 2019