IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.410 of 2021

Arising Out of PS. Case No.-44 Year-2009 Thana- BARHARIA District- Siwan

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1. Draupadi Kunwar @ Draupati Kunwar Wife Of Late Vijay Mishra @ Vijay Kumar Resident Of Usari, P.S.- Barharia (G.B. Nagar), District - Siwan (Bihar).
2. Anup Mishra Son of Late Vijay Mishra @ Vijay Kumar Resident of Usari, P.S.- Barharia (G.B. Nagar), District - Siwan (Bihar).
3. Devendra Mishra Son of Late Ramayan Mishra Resident of Usari, P.S.- Barharia (G.B. Nagar), District - Siwan (Bihar).

... ... Petitioners

Versus

1. The State of Bihar
2. Babunand Mishra Son of Late Ram Ramdadan Mishra Resident of Village -

... ... Respondents

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Appearance :

For the Petitioners	:	Mr. Vijay Kumar Mishra, Advocate
For the State	:	Mr. Upendra Kumar, APP
For the O.P. No.2	:	None

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CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR

CAV JUDGMENT

Date : 07-01-2025

The present Criminal Revision petition has been preferred by the petitioners against the impugned order dated 18.01.2020, passed by learned Trial Court F.T.C-I, Siwan in Sessions Trial No. 122 of 2012, whereby the petitioners have been summoned under Section 319 Cr.PC for facing the trial.

2. The prosecution case as emerging from the written report dated 04.04.2009 given by the informant to the Officer

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Incharge of G.B. Nagar, Police Station, Siwan, is that the accused Keshav Mishra, Devendra Mishra, Drauptai Kunwar and Anup Mishra set fire to the hut like house of the informant where he was shifting his household items after demolishing his old house. The house got burnt. At the time of burning of the house, his brother and son were present. Four new cycles, big boxes, hundred sacks of grains, paddy and wheat, sewing machine, pumping sets, thrasher and other items worth Rs.4-5 lacs got destroyed. The accused persons fled away after setting fire to his house.

3. On the basis of the written report, Barhariya P.S. Case No. 44 of 2009 was lodged on 05.04.2009 against four accused persons, namely, Keshav Mishra, Devendra Mishra, Drauptai Kunwar and Anup Mishra for offence punishable under Section 436 read with Section 34 of the Indian Penal Code. After investigation, charge-sheet was submitted only against one of the accused persons, namely, Keshav Mishra and the rest accused persons were exonerated by the police.

4. During course of trial, three prosecution witnesses viz., Shivnath Sah, Babunand Mishra and Lalbabu Mishra were examined and after their examination, one application was moved by the prosecution for summoning the rest accused

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persons, who are petitioners herein, the application was allowed by learned Trial Court by the impugned order, summoning the petitioners to stand trial along with the accused who was already facing the trial. Being aggrieved, the petitioners have preferred the present revision petition.

5. I heard learned counsel for the petitioners and learned APP for the State. However, nobody is present on behalf of O.P. No. 2.

6. Learned counsel for the petitioners submits that the petitioners are innocent and have been falsely implicated in this case. He further submits that the impugned order is not sustainable in the eye of law.

7. To substantiate his submissions, he further submits that the petitioners were named accused in the FIR, but after investigation, they were found to be innocent and hence, no charge-sheet was submitted against them and, as such, they are beyond the reach of Section 319 Cr.PC because they were already accused and, hence, Section 319 Cr.PC will not applicable against them and they cannot be summoned. As such, learned Trial Court has erroneously summoned the petitioners to face the trial on the basis of evidence of the prosecution witnesses recorded during trial. He refers to and relies upon the

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judgment dated 26.04.2024 passed by learned Single Judge of this Court in **Shivjee Singh Vs. State of Bihar and Anr. (Cr.Misc. No. 31020 of 2016)**.

8. He also submits that even the standard of evidence as required for summoning an accused under Section 319 Cr.PC is not there in the evidence of the prosecution witnesses and, hence, the impugned order is not sustainable in the eye of law.

9. However, learned APP for the State defends the impugned order submitting that there is no illegality or infirmity in the impugned order. He further submits that the petitioners were not charge-sheeted and hence, they could be summoned under Section 319 Cr.PC on the basis of the Prosecution evidence which had come during trial.

10. I considered the submissions advanced by both the parties and perused the materials on record.

11. Before I consider the rival submissions of the parties, it would be pertinent to examine the scope and ambit of the power of the Courts under Section 319 Cr.PC which reads as follows:-

> **"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

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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 witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. In **Hardeep Singh vs. State of Punjab and Ors, (2014) 3 SCC 92,** Hon'ble Constitution Bench of Apex Court had occasion to consider in detail the scope and ambit of power of the Courts under Section 319 Cr.PC and held as follows:

"19. 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. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

.....

22. In our opinion, 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. It is this part which is under reference before this Court and therefore in our opinion, while answering the question referred to herein, we do not find any conflict so as to delve upon the situation that was dealt with by this Court in Dharam Pal v. State of Haryana, (2014) 3 SCC 306.

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95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan (2014) 3 SCC 321, held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

.....

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.

Question (v)—In what situations can the power under this section be exercised : not named in FIR; named in the FIR but not charge-sheeted or has been discharged?

107. In **Joginder Singh v. State of Punjab (1979) 1 SCC**

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345, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 CrPC excludes from its operation an accused who has been released by the police under Section 169 CrPC and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the court and the very purpose of enacting such a provision like Section 319(1) CrPC clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

.....

111. Even the Constitution Bench in **Dharam Pal v. State of Haryana, (2014) 3 SCC 306** has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the charge-sheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 CrPC can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and

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try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 CrPC without resorting to the provision of Section 319 CrPC directly.

113. In Sohan Lal v. State of Rajasthan (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 CrPC cannot be circumvented by prescribing to procedure under Section 319 CrPC.

.....

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,

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> 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."
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> (Emphasis Supplied)

13. After considering the relevant statutory provisions and judicial precedents, the Hon'ble Apex Court in **Hardeep Singh case (supra)** summarized the legal position regarding the extent and scope of Section 319 Cr.PC in the following words:-

> **"117.** We accordingly sum up our conclusions as follows:
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> **Questions (i) and (iii)**
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> **— 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?**
>
> **Answer**
>
> **117.1.** In Dharam Pal case [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : AIR 2013 SC 3018] , the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till "evidence" under Section 319 CrPC becomes available for summoning an additional accused.
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> **117.2.** Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

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117.3. In view of the above position the word "evidence" in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—Whether the word "evidence" used in Section 319(1) CrPC 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?

Answer

117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)—What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge [Ed. : The conclusion of law as stated in para 106, p. 138c-d, may be compared:"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". See also especially in para 100 at p. 136f-g.] . The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the

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trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)—Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh."

(Emphasis supplied)

14. In **S. Mohammad Ispahani Vs. Yogendra Chandak and Others (2017) 16 SCC 226,** Hon'ble Supreme Court had again considered the summoning of accused who was named in the FIR but not named in the charge sheet to face on-going trial. In the judgment, the Hon'ble Supreme Court held as follows:-

"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

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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."

(Emphasis Supplied)

15. Similar view was again expressed by Hon'ble Supreme Court in **Rajesh and Ors. Vs. State of Haryana (2019) 6 SCC 368,** holding as follows:-

"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."

(Emphasis Supplied)

16. In **Manjeet Singh Vs. State of Haryana and Others (2021) 18 SCC 321,** Hon'ble Supreme Court had again considered the scope and ambit of Section 319 Cr.PC for summoning of additional accused and summarized the legal position, observing as follows:-

"**15**. The ratio of the aforesaid decisions on the scope and ambit of the powers of the court under Section 319CrPC can be summarised as under:

15.1. That while exercising the powers under Section 319CrPC 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.

15.2. For the empowerment of the courts to ensure that the criminal administration of justice works properly.

15.3. The law has been properly codified and

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modified by the legislature under 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.

15.4. To discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished.

15.5. 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.

15.6. Section 319CrPC allows the court to proceed against any person who is not an accused in a case before it.

15.7. 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.

15.8. Section 319CrPC 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.

15.9. 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 207/208CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion.

15.10. The court can exercise the power under Section 319CrPC only after the trial proceeds and commences with the recording of the evidence.

15.11. The word “evidence” in Section 319CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents.

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

15.13. If the Magistrate/court is convinced even on

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the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319CrPC and can proceed against such other person(s).

15.14. That if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319CrPC can be exercised.

15.15. That power under Section 319CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not to wait till the said evidence is tested on cross-examination.

15.16. 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 319CrPC 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).”

(Emphasis Supplied)

17. In **Jitendra Nath Mishra Vs. State of Uttar Pradesh and Another, (2023) 7 SCC 344,** the Hon’ble Supreme Court has summarized the principles regarding summoning of additional accused under Section 319 Cr.PC in the following words:-

“10. Section 319 Cr.PC, which envisages a discretionary power, empowers the court holding a trial to proceed against any person not shown or mentioned as an accused if it appears from the evidence that such person has committed a crime for which he ought to be tried together with the accused who is facing trial. Such power can be exercised by the court qua a person who is not named in the FIR, or named in the FIR but not shown as an accused in the charge-sheet. Therefore, what is essential for exercise of the power under Section 319CrPC is that the evidence on record must show the involvement of a person in the commission of a crime and that the said

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> person, who has not been arraigned as an accused, should face trial together with the accused already arraigned. However, the court holding a trial, if it intends to exercise power conferred by Section 319CrPC, must not act mechanically merely on the ground that some evidence has come on record implicating the person sought to be summoned; its satisfaction preceding the order thereunder must be more than prima facie as formed at the stage of a charge being framed and short of satisfaction to an extent that the evidence, if unrebutted, would lead to conviction."
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> (Emphasis Supplied)

18. In **Juhru and Others Vs. Karim and Another (2023) 5 SCC 406,** the Hon'ble Supreme Court has again explained the extent and scope of Section 319 Cr.PC holding as follows:-

> **"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 319 Cr.PC ought not to be invoked."

19. Even in the latest judgment of **OMI @ Omkar Rathore & Anr. Vs. The State of Madhya Pradesh and Anr.** as decided on 3.01.2025 **[SLP (Crim) No. 17781 of 2024]**, **Hon'ble Apex Court** has summarized the Principles of law as

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regard Section 319 Cr.PC in the following words:

> " 21. The principles of law as regards Section 319 of the CrPC may be summarised as under:
>
> a. on a careful reading of Section 319 of the CrPC as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceedings on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial
>
> b. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence.
>
> c. The power of the court under Section 319 of the CrPC is not controlled or governed by naming or not naming of the person concerned in the FIR. Nor the same is dependent upon submission of the charge-sheet by the police against the person concerned. As regards the contention that the phrase 'any person not being the accused' occurred in Section 319 excludes from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in column No. 2 of the charge-sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such provision like Section a 319 (1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression.
>
> c. It would not be proper for the trial court to reject the application for addition of new accused by considering records of the Investigating Officer. When the evidence of complainant is found to be worthy of acceptance then the satisfaction of the Investigating Officer hardly matters. If satisfaction of Investigating Officer is to be treated as

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> determinative then the purpose of Section 319 would be frustrated."

20. Hence, it clearly emerges from the statutory provisions and binding judicial precedents that the Court is empowered to summon any person to be tried together with the accused if it appears to the Court, on the basis of the evidence adduced during the ongoing trial, that he has committed the offence. The rationale behind such provision is that the Court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and to ensure that no guilty person escapes from criminal justice system by manipulating the investigating and/or the prosecuting agency.

21. Here, the expression 'any person' means any person who is not being tried by the Court in the ongoing trial. It includes even such persons who were named in the FIR but not charge-sheeted after investigation. Even such persons who were discharged at the stage of framing of charge are included in the expression "any person" and may be summoned under Section 319 Cr.PC complying with the requirements of Section 300 and 398 Cr.PC.

22. In **Joginder Singh Vs. State of Punjab (1979) 1 SCC 107** the full Bench of Hon'ble Apex Court had held that persons who were named in the FIR but released by the police

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under Section 169 Cr.PC and not charge-sheeted, are excluded from the expression “any person”. But Hon’ble the Constitution Bench in **Hardeep Singh case (supra)** did not agree with this view and held that even such person who were named in the FIR but were not charge-sheeted after investigation by the police, come within the purview of Section 319 Cr.PC and they may be summoned if the evidence shows their involvement in the offence. Even in **Dharam Pal case (supra)**, Hon’ble Constitution Bench has held that the persons named in the FIR, but not charge-sheeted by the police after investigation, may be summoned by the Court, provided the Court is satisfied that the conditions provided in the statutory provisions stand fulfilled.

23. It also emerges that power under Section 319 Cr.PC is a discretionary and extraordinary power and it is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It should not be exercised in a casual and cavalier manner.

24. It also emerges that at the time of summoning under Section 319 Cr.PC the Court has to see that there is a strong and cogent evidence against such person laid before the Court and not merely probability of his complicity. The degree of satisfaction of the Court is much stricter. The test that has to

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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. The "evidence" is limited to the evidence recorded during trial. The Court can exercise its power under Section 319 Cr.PC even at the stage of completion of examination-in-chief and it is not required to wait till the completion of cross-examination. It is for the Court to be satisfied regarding the complicity of other persons not facing the trial in the offence, as per the evidence on record.

25. Coming to the case on hand, I find that the Petitioners were named in the FIR and after investigation they were not charge-sheeted. However, after examination of three prosecution witnesses, learned Trial Court on application of the prosecution, summoned the Petitioners under Section 319 Cr.PC to stand trial along with the accused in the ongoing trial. In view of the Constitution Bench judgment of **Hardeep Singh case (supra)**, it is well settled that persons named in the FIR but not charge-sheeted after investigation can be summoned under Section 319 Cr.PC if the Court finds that there is strong and cogent evidence recorded during trial regarding their complicity in the offence. **Shivjee Singh case (supra)** as decided by

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learned Single Judge of this Court and relied upon by the Petitioners is, in my humble opinion, *per incurium,* as it has been passed by learned Single Judge ignoring the ratio *decidendi* of **Hardeep Singh case (supra)** and hence this Court is not bound by it. In Shivji Singh case the Petitioners were named in the FIR but not charge-sheeted after investigation and they were summoned under Section 319 Cr.PC on the basis of the prosecution evidence recorded during the Trial. But learned Single Judge relying upon the **Sohan Lal and Others Vs. State of Rajasthan (1990) 4 SCC 580** and ignoring the ratio *decidendi* of Hardeep Singh case, allowed their petition setting aside the summoning order passed against them**.**

26. From perusal of the **Sohan Lal case (supra),** it transpires that it was decided by Hon'ble Division Bench of the Apex Court in 1990 and in that case the question was- whether the persons who were partially or fully discharged, could be summoned under Section 319 Cr.PC. Here it was held as follows:

> "33. ……the provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code,

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> the nature of finality to such order and the resultant protection of the persons discharged subject to revision under Section 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered (sic tempered) with though it may be, as Sir James Stephen says: “The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.” (General View of the Criminal Law of England, p. 99). The APP's application under Section 216, insofar as the appellants 1 to 3 were concerned, could be dealt with under Section 216. Appellants 4 and 5 could be dealt with neither under Section 216 nor under Section 319. In that view of the matter the impugned order of the Magistrate as well as that of the High Court insofar as the appellants 4 and 5, namely, Vijya Bai and Jiya Bai are concerned, have to be set aside which we hereby do. The appeals are allowed to that extent.”

27. But I find that in the **Shivji Singh case (supra)**, the Petitioners were not discharged. In fact, they were named in the FIR but not charge-sheeted by the police after investigation. Hence, the ratio of **Sohan Lal Case (supra)** was erroneously applied, in my humble and respectful opinion, by learned Single Judge in **Shivji Singh case (supra)** and binding precedent of **Hardeep Singh case (supra)** was ignored.

28. As such, in the facts and circumstances of the case on hand, it was legally permissible for the Court to summon the Petitioners under Section 319 Cr.PC, if the evidence recorded during the ongoing trial was strong and cogent.

29. As per the relevant material on record, I find that,

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allegedly, the Petitioners and co-accused had set fire to the hut like house of the informant, resulting into destruction of his house and household items. During trial, three witnesses, Shivnath Shah, Babulal Mishra and Lalbabu Mishra were examined. After perusal of their evidence as recorded during the trial, I find that P.W.-1,Shivnath Shah is an eye witness to the alleged occurrence and he has clearly deposed that the Petitioners had set the house of the informant to fire resulting into destruction of his house and household items. His evidence does not appear to be demolished even after his cross-examination. P.W.-2, Babulal Mishra is also an eye witness and informant of the case and has supported the prosecution case against the Petitioners. His evidence also appears to be intact even after his cross-examination. P.W.-3- Lalbabu Mishra, is also an eye witness to the alleged occurrence and has supported the prosecution case against the Petitioners. His evidence appears to be intact even after his cross-examination.

30. From the prosecution evidence, it also appears that there is dispute between the accused-Petitioners and the informant regarding land on which the hut like house of the informant was standing and destroyed by fire. As such, there appears to be a strong motive on the part of the Petitioners to

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commit the offence.

31. Hence, I find that the evidence recorded against the Petitioners in the ongoing trial is strong and cogent. It is more than a *prima facie* case. As such, there is no illegality or infirmity in the impugned order rendering the present petition liable to be dismissed.

32. Accordingly, petition is dismissed.

(Jitendra Kumar, J.)

Shoaib/
S.Ali/Chandan -

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