

**AFR**

**Reserved on-** 11.09.2023

**Delivered on-**18.09.2023

Neutral Citation No. - 2023:AHC-LKO:59795

**Court No. - 28**

**Case :-** APPLICATION U/S 482 No. - 58 of 2009

**Applicant :-** Vinod Kumar Gupta

**Opposite Party :-** State of U.P.

**Counsel for Applicant :-** R.B.S. Rathaur,Aditya Vikram Singh,Arun Sinha,Jeet Bahadur

**Counsel for Opposite Party :-** Govt. Advocate

**Hon'ble Shree Prakash Singh,J.**

1. Heard Sri Aditya Vikram Singh, learned counsel for the applicant, Sri Aniruddha Kumar Singh, learned A.G.A.-I and Sri Sanjay Kumar Yadav, A.G.A. for the State.
2. Instant application has been filed with prayer to quash the order dated 11.12.2008 passed by Additional Sessions Judge FTC(III), Lucknow, in S.T. Case No. 119 of 2008 ( State Versus Smt. Asha Alias Sanjana and others), arising out of Case Crime No. 271 of 2007, under section 376, 120 B IPC, Police Station Naka, district Lucknow and further prayed that the operation, implementation and effect of the order dated 11.12.2008 passed by the Additional Sessions Judge / FTC-III, Lucknow may be stayed.
3. Factual matrix of the case is that first information report was lodged bearing case crime no. 271 of 2007, by the victim/prosecutrix at police station-Naka, District- Lucknow under section 376 of IPC, wherein, Asha @Sanjana and two unknown persons were implicated. It has been alleged in the first information report that the prosecutrix was traveling with one Asha @ Sanjana on 27.07.2007 and while reaching at Charbagh Railway Station, she met with two other unknown persons, though were known to Asha @ Sanjana and they took away the prosecutrix along with Asha to nearby hotel and thereafter, they committed rape with her.
4. From perusal of the order sheet, it is evident that on 20.10.2022, this Court has passed the order and noted that from perusal of the report dated 22.01.2020 submitted by the Chief Metropolitan Magistrate, Kanpur Nagar reveals that the

victim in this case has changed her place of residence and shifted to some other un-known place, which is not known to anyone and under the aforesaid circumstances, the notice could not be served. Now this Court is proceeding in the matter.

5. After thorough investigation in the matter, the chargesheet was filed on 08.10.2007, under section 376 and 120B of IPC, against Asha @ Sanjana and Sagar Sinha and during course of the trial, which was numbered as Sessions Trial No. 119 of 2008 (State Vs Smt Asha @ Sanjana and others), an application was instituted by the prosecutrix under section 319 of Cr.P.C., on 29.08.2008, with prayer to summon Manish Dubey and Rajesh Yadav, as accused persons, who basically said to have committed rape upon prosecutrix, on the date of the incident. The application moved by the prosecutrix was allowed by the Sessions court, vide order dated 11.12.2008, whereby, the applicant as well as one other accused, has been summoned. Therefore, the order dated 11.12.2008, which was passed in application under section 319 of Cr.P.C., is under challenge, in the present matter.

6. Contention of learned counsel for the applicant is that the learned trial court summoned the applicant, without there being any evidence against him, as from bare perusal of order dated 11.12.2008, it reveals that learned Sessions Judge, after the application, moved by the prosecutrix under section 319 of Cr.PC, conducted an inquiry of his own by seeking internal report from some officer of the department of the Indian Railways and on the basis of said internal communication between the learned trial court and the Railways, the applicant has been summoned.

7. Adding his arguments, he submits that learned trial court travelled beyond its jurisdiction and on the basis of presumption, has given its finding that since the applicant was working as Travelling Ticket Examiner (T.T.E.), on the date of Incident and therefore, he must be the person, who committed rape with the prosecutrix and not actually the person who are named in the first information report. Further, has also been assumed by the trial court that once the applicant would be produced before the prosecutrix, she could identify the present applicant as being involved in the offence. He submits that so far as the statement of the prosecutrix is concerned, she initially named some other accused namely, Sagar Sinha and thus, there was no reason to believe that the present applicant has

committed rape, as there was no evidence except apart the statement of the prosecutrix, before the trial court, for invoking its jurisdiction under section 319 of Cr.P.C. So far as two unknown accused persons said to be involved in offence are concerned, the Investigating Officer, found two persons, other than the present applicant, for committing rape with prosecutrix, though the prosecution, ultimately failed to prove its case beyond the reasonable doubt against them.

**8.** Adding his argument, he submits that learned trial court has exceeded to its powers vested under section 319 of Cr.P.C. and has erroneously passed the impugned order, on the basis of personal opinion regarding involvement of the present applicant, in the matter.

**9.** Section 319 of Cr.P.C. is quoted herein under:-

*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 a fresh, 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.*

**10.** Referring the aforesaid, he submits that during course of inquiry or trial of an offence, any person can be summoned if appears to have committed the offence and therefore after pronouncement of the judgment, no person can be summoned under the above-said provisions.

11. In support of his contention, he has placed reliance on the judgment reported in **(2014) 3 SCC page 92 Hardeep Singh Versus State of Punjab and Others** and has referred paragraphs 78, 95 and 105.

12. Paragraphs 78, 95 and 105 of the judgment are quoted hereinunder:-

*78. It is, therefore, clear that 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. 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.*

*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: (2013) 11 Scale 23]*. 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.*

13. Placing reliance on above-said judgment, he submits that it has been settled that the Magistrate can invoke its power under section 319 of Cr.P.C. while summoning an accused, if there is much stronger evidence than mere possibility of its complicity. It has further been held that the test which has to be applied, is that there is more than prima facie case as it was at the time of exercising the framing of charges and if it is not so, then court should refrain to exercise its power under section 319 of Cr.PC.

14. He has further placed reliance rendered in case of **Labhuji Amratji Thakor and others Versus State of Gujarat and another** reported in (2019) 12 SSC

page 644 and has referred paragraphs 8 and 13 of the above-said judgment. Paragraphs 8 and 13 of the judgment are quoted hereinunder:-

*"8. The Constitution Bench in the above judgment in Hardeep Singh' has held that under Section 319 CrPC court can proceed against any person, who is not an accused in a case before it. The Constitution Bench, however, has held that the person against whom the court decides to proceed, "has to be a person whose complicity may be indicated and connected with the commission of the offence".*

*13. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh' has to apply the test i.e. "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."*

**15.** The Apex Court has reiterated the principle which was laid down in Hardeep Singh's Case and the test of more than prima facie case has again been accepted, for invoking the power under section 319 of Cr.P.C. Further so far as the Sessions Trial No. 119 of 2008 (State Vs Smt Asha @ Sanjana and others) is concerned that was concluded and the judgment and order was passed on 12.05.2014, wherein the accused persons namely Asha@ Sanjana and Sagar Sinha, have been acquitted.

**16.** Concluding his arguments, he submits that the reasons for summoning the present applicant mentioned in the order dated 11.12.2008, goes against the settled proposition of law rendered in case of Hardeep Singh Versus State of Punjab and Others and Labhuji Amratji Thakor and others Versus State of Gujarat and another (Supra), as the same has been passed on conjuncture and surmises and that too on an internal correspondence by the trial court to the department of Railways, which is impermissible under the law. He added that except apart the aforesaid facts, there was no stronger evidence against the applicant, so as to substantiate the findings of learned trial court in the order dated 11.12.2008.

**17.** Except apart the aforesaid arguments, he has further submitted that the applicant is no way involved in committing the offence and he is about fifty-seven years of age and is suffering with carcinoma of advance stage, therefore, further criminal proceedings against the present applicant would amount to harassment. Thus, submission is that the impugned order dated 11.12.2008 may be set aside and criminal proceedings against the present applicant may be dropped.

**18.** Per contra, learned counsel for the State has vehemently opposed the submission aforesaid and argued that in fact the prosecutrix could not identify the two accused persons at the time of occurrence of the offence and once the matter proceeded then, she by way of filing an application under section 319 of Cr.P.C., prayed for summoning the accused and also prayed that the present applicant may be tried together with other accused, who is already named in the FIR. He added that in fact there was no means with prosecutrix to identify the present applicant and therefore, the persons to whom she could identify, named him in the FIR and two unknown persons were also told for committing rape upon her.

**19.** He further contended that learned trial court while passing the order dated 11.12.2008, has thoroughly discussed the evidence which is evident from bare perusal of the same, as apparently, there are two grounds considered for invoking the jurisdiction under section 319 of Cr.P.C. Firstly, as discussed by the trial court that since it was informed by the department that on the date of the incident, the present applicant including the other co-accused was posted at the Charbagh Railway Station and Secondly, the prosecutrix has named the applicant including two other unknown accused persons. The evidence which have been discussed in the impugned order dated 11.12.2008, is sufficient to show more than the prima facie case against the applicant, thus, submission is that the order dated 11.12.2008 is lawful and no interference is warranted.

**20.** Having heard learned counsels for the parties and after perusal of material placed on record, it transpires that initially the FIR was lodged on 01.08.2007, wherein, Asha @ Sanjana and two other accused persons were named, though, the Police filed the chargesheet against Sagar Sinha, under section 376 of Cr.P.C. Thereafter, the trial was concluded and the accused persons, named in the FIR, namely Asha @ Sanjana and Sagar Sinha, were acquitted vide the judgment and order dated 12.05.2014.

**21.** Fact remains that the application under section 319 of Cr.P.C. was moved on 29.03.2008 before the trial court by the victim herself and thereafter, the impugned order was passed on 11.12.2008. The order dated 11.12.2008 was challenged by the applicant by way of the present application, wherein, the interim order was passed on 16.04.2009 and since then, the matter is pending before this Court, whereas, the matter against other accused persons were concluded on 12.05.2014, whereby, those co-accused persons were acquitted.

**22.** From bare reading of the impugned order, it emerges that the trial court made some internal correspondence to the department of railways, wherein, it was intimated by the Railways Department that the present applicant including one other accused person, were posted at Charbagh Railway station during the period of alleged occurrence. It seems that the trial court on the presumption that since the present applicant was also posted at Charbagh Railway Station, therefore, he would have involved in committing the said offence, proceeded in the matter and invoked the jurisdiction under section 319 of Cr.P.C., and summoned the applicant.

**23.** Secondly, the ground of considering the victim's application under section 319 of Cr.P.C., is that, if the applicant including the other accused persons shall be brought before the prosecutrix, she would identify them, which in fact based on conjecture and surmises. The trial court has based its finding on hypothesis as the evidence which is expected to come into light in future, was considered as one of the strongest ground for summoning the present applicant.

**24.** When this Court examines the findings recorded by the trial court, in the impugned order dated 11.12.2008, it emerges that a letter which was sent to the department of Railways, seeking information with respect to posting of the applicant at Charbagh Railway Station and further the response received thereof, are unlawful as there is no such procedure prescribed in Cr.P.C. or any other law for the time being in force, which could empower the trial court to exchange any internal correspondence to any of the agency or institution for reaching upon any conclusion and therefore, so far as the present matter is concerned, the trial court has wrongly proceeded, while referring the matter, vide its letter to the department of Railways thereby seeking certain informations. Further such information could not have been treated as an evidence, at any stage of the trial.

25. This Court is also of considered opinion that the provisions of criminal law are stringent and that affects and curtails the right to life and personal liberty of a person and therefore, no order can be passed on the basis of hypothesis unless there is prima facie satisfaction of being much stronger evidence. In the present matter it has categorically been recorded in the impugned order that 'if the applicant shall be brought before the prosecutrix/victim, she would identify the accused who were involved in the offence.' This clearly indicates that there is no probability that the present applicant was involved in committing offence.

26. It is trite law that nature of satisfaction which is required for invoking the power under section 319 of Cr.P.C. is analogous to the degree of satisfaction as is required for 'framing of charges' and therefore, there requires much stronger evidence than mere probability of the complicity, but so far as the present case is concerned, the trial court has failed to follow the above-said test.

27. Further, there is un-rebutted contention of counsel for the applicant that the applicant is 57 years of age and he is suffering with Carcinoma of advanced stage. Though, the same do not have any legal consequence, but it prima facie corroborates the arguments.

28. This Court is also not unmindful to the judgment of Apex Court rendered in Hardeep Singh Versus State of Punjab and Others and Labhuji Amratji Thakor and others Versus State of Gujarat and another (Supra), which also supports the version of the applicant.

29. Consequently, the impugned order dated 11.12.2008 is hereby set aside and the criminal proceedings of Sessions Trial No. Case No. 119 of 2008 ( State Versus Smt. Asha Alias Sanjana and others) arising out of Case Crime No. 271 of 2007 under section 376, 120 B IPC, Police Station Naka, District Lucknow, are hereby quashed.

30. The application is **allowed** accordingly.

**Order Date :- 18.09.2023**

Mayank