

Summoning of additional Accused Section 319 of the Code of Criminal Procedure

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Abstract: During course of criminal justice system from the initial stage of investigation some time it happens that those who are actually committed the offence easily escape the boundaries of penal law, by one way or the other. Most commonly it happens so during the investigative stage of the offence which results in filling of improper charge sheet, due to laxity in investigation. It has been seen a number of times in day to day court practice that where the complainant has mentioned a certain number of person during recording of FIR, such as 4 – 5 accused who are directly or indirectly responsible for commission crime. But their names were deleted before filing of charge sheet under section 173 (2) of Cr.P.C., and then the victim or the complainant left with no option except to record his or her evidence before the court and then move an application under Section 319 of Cr.P.C for summoning of accused involve in crime, named in FIR but not Charge sheeted before the court or the Victim or Complainant have to opt for filing of a separate Complaint otherwise then of police report, against the reaming accused who were not charge sheeted. If the Victim or the complainant does not opt either way then also Court is empowered to precede Suo – Muto, if a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. Because the Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to the society at large to ensure that the guilty does not get away from the clutches of law.

Keywords: Section 319, Code of Criminal Procedure

I. SECTION 319 OF CODE OF CRIMINAL PROCEDURE, 1973

Section 319 of the code of criminal procedure, 1973 deals with power of a magistrate to proceed against other persons appearing to be guilty of offence and provides that:-

1. Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
2. Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
3. Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the

inquiry into, or trial of, the offence which he appears to have committed.

4. Where the Court proceeds against any person under sub-section (1), then-
 - a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
 - b) Subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

Section 319 Cr.P.C. springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the charge sheet

filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence. In *Raghubans Dubey v. State of Bihar*,¹ The hon'ble Supreme Court held that once cognizance has been taken by the magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.

II. STAGE AT WHICH POWER UNDER SECTION 319 CAN BE INVOKED BY THE COURT.

Section 319 itself explains the stage at which such a power can be invoked by the Court. Sub section 1 of Section 319 provides that 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. Both the terms "Inquiry" and "Trial" is to be understood independently. However, the code of Criminal however not provide the definition of term Trial but The term inquiry is defined under section 2 (g) of the Code which means every inquiry, other than a trial, conducted by a magistrate or Court.

In *Moly & Anr. v. State of Kerala*,¹ the Supreme Court has observed that though the word 'trial' is not defined in the Code, it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. A three-Judge Bench of Supreme Court in the *State of Bihar v. Ram Naresh Pandey & Anr.*,² held that the words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard

to the scheme and purpose of the provision under consideration.

Accordingly, the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances which form part of inquiry relevant for the purposes of Section 319 Cr.P.C i.e. provisions of Sections 200, 201, 202, etc. Cr.P.C., applicable in the case of Complaint Cases.

III. ESSENTIAL INGREDIENT OF SECTION 319 CR. PC

The essential for the purpose of the section is that *there should appear some evidence* against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons..

In *Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr.*,³ it was held by the Hon'ble Court that the word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.

IV. CAN A PERSON WHOSE NAME APPEAR IN FIR AS AN ACCUSED, BUT NOT CHARGE SHEETED CAN BE SUMMONED BY INVOKING POWER UNDER SECTION 319 CR.P.C

Yes, The Supreme Court in case of *Lok Ram v. Nihal Singh & Anr.*,⁴ it was held that it is evident that a person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added as an accused to face the trial. The trial court can take such a

¹ AIR 2004 SC 1890

² AIR 1957 SC 389

³ 2011 SC 760

⁴ AIR 2006 SC 1892

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.

V. DOES POWER UNDER SECTION 319 CR.P.C CAN BE INVOKED AFTER EXAMINATION – IN – CHIEF?

Yes, it was held by the Supreme Court in case of *Hardeep Singh v State of Punjab*,⁵ that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

VI. CAUTION TO BE TAKEN BY THE COURT BEFORE EVOKING POWER UNDER SECTION 319 CR.P.C.

The degree of satisfaction required for invoking the power under Section 319 Cr.P.C. is explained by the Supreme Court in case of *Sarabjit Singh & Anr. v. State of Punjab & Anr.*,⁶ while explaining the scope of Section 319 Cr.P.C., a two - Judge Bench of this Court observed that for the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for

the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.

VII. CONCLUSION

It is the duty of the Court to do justice by punishing the real culprit. 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. And the power conferred under Section 319 Cr.P.C. is only on the court. This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word “court” in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of “Classification of Offences” under the First Schedule specifies the expression ‘magistrate of first class’ and ‘any magistrate’ to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates. 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.

¹ AIR 1967 SC 1167

⁵ Criminal Appeal No 1750 of 2008 SC , Decided on 10.01.2014

⁶ AIR 2009 SC 2792