

**Asha and Others Vs. State of Karnataka by Electronic City Police, rep. by Learned Special Public Prosecutor**

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**SooperKanoon Citation : [sooperkanoon.com/1182963](http://sooperkanoon.com/1182963)**

**Court : Karnataka**

**Decided On : Mar-30-2016**

**Judge : A.V. Chandrashekara**

**Appeal No. : Criminal Revision Petition No. 231 of 2016**

**Appellant : Asha and Others**

**Respondent : State of Karnataka by Electronic City Police, rep. by Learned Special Public Prosecutor**

**Judgement :**

(Prayer: This Crl.RP filed u/s.397 Cr.P.C by the advocate for the petitioner praying that this Hon ble court may be pleased to set aside the Order dated 08.02.2016 passed in S.C. No. 2/2013 on the file of VIII Addl. Dist. and S.J., Bangalore Rural District, Bangalore and consequently quash the order of issuing summons against them.)

1. Heard the learned counsel for the petitioners, Mr. Hasmath Pasha and Mr. Rachaiah, learned HCGP representing the State.

2. The present petition is filed under Section 397, Cr.P.C. by the petitioners who are arrayed as additional accused nos.3 to 6 in a criminal case in S.C.2/13. The respondent police have filed charge sheet against accused nos.1 and 2 for the

offences punishable under Sections 498A, 304B read with Section 34, I.P.C. and Sections 3 and 4 of the Dowry Prohibition Act, 1961. These petitioners had been shown as accused in the first information and after conclusion of investigation, they were not sent up for trial by the I.O. in the charge sheet filed.

3. Case came to be committed to the sessions court after submission of charge sheet against accused nos.1 and 2 for the above offences. The examination in chief of CW-1, Venkatesh is recorded and he is examined as PW-1. On the basis of his examination-in-chief, the learned public prosecutor chose to file an application in terms of Section 319, Cr.P.C. seeking permission to array these petitioners as additional accused.

4. The learned sessions judge has allowed the same and issued summons to these petitioners to appear before him to trial for the above offences. It is this order which is called in question in this petition on various grounds as set out in the memorandum of revision petition.

5. Mr. Hasmath Pasha would contend that whenever an application is filed under Section 319, Cr.P.C. to array any person as an accused, prior notice is to be issued calling upon him/her to show cause why he/she should not be made and accused. Only after hearing him/her an order can be passed to that effect. It is argued that without issuing prior notice, the court is not justified in issuing summons against these petitioners to be roped in as accused.

6. Placing reliance on the decision of the Hon ble apex court the case of JOGENDRA YADAV and OTHERS .v. STATE OF BIHAR (AIR 2015 SC 2951), he has argued that when a person is added as an accused under Section 319, Cr.P.C., he is necessarily to be heard before being so added and Often he gets a further hearing if he challenges the order before the High Court.

7. Mr. Rachaiah, learned HCGP has relied up on a two-Judge Bench decision of the Hon ble apex court in the case of HARDEEP SINGH .v. STATE OF PUNJAB and OTHERS ([2009] 16 SCC 785). He has argued that before issuing summons or process, the criminal court is expected to see as to whether there is a prima facie case against the person sought to be summoned or against whom process is

sought to be issued at that stage. It is argued that at the stage of issuing summons or process, the court has to see whether there is a prima facie case against the person sought to be summoned or against whom process is sought to be issued, and at that stage, no question of giving an opportunity of hearing such person arises, as the entire scheme of the Code of Criminal Procedure does not provide for an accused to come into the picture at all till process is issued. He has relied on an earlier decision in the case of NAGAWWA .v. VEERANNA ([1975] 3 SCC 736) referred to and relied upon by the Hon ble apex court in the case of HARDEEP SINGH (supra).

8. After hearing the learned counsel for the parties and perusing the records, the only point that arises for the consideration of this court is:

Whether the trial court is justified in summoning the petitioners as accused in terms of Section 319, Cr.P.C. without giving them an opportunity of being heard?

#### REASONS

9. Mr. Hasmath Pasha has relied on the decision in the case of JOGENDRA YADAV (supra) rendered by a Bench consisting of two Hon ble Judges. The Constitutional Bench of the Hon ble apex court, in the case of HARDEEP SINGH .v. STATE OF PUNJAB and OTHERS ([2014] 3 SCC 92) has also relied on the case of JOGENDRA YADAV. As per the facts in the case of JOGENDRA YADAV, four persons had been added as accused in terms of Section 319, Cr.P.C. in a criminal case in Sessions Trial No.446/02 registered for the offence punishable under Section 302 read with Sections 149 and 323, I.P.C. and Section 27 of the Arms Act, 1959. Trial was held in respect of the murder of one Saryug Yadav and first information was lodged against eight persons and charge sheet was filed on 23.4.2001 only against four persons. Later on, a supplementary charge sheet was submitted on 31.1.2003 by which one Bhankhar Yadav was included. In the final report submitted, the names of the appellants therein, i.e. Jogendra Yadav, Kailash Yadav, Kusum Pahalwan and Brijendra Yadav had been left from the array of parties. On 18.2.2003, the magistrate accepted the charge sheet and took cognizance and the case was committed to the court of sessions.

10. During the course of trial in the case of JOGENDRA YADAV, the evidence of the widow and two sons of the deceased was recorded, on the basis of which the sessions judge issued notices to the appellants in terms of Section 319, Cr.P.C., by order dated 5.2.2005, asking the said four persons to show cause as to why they should not be added as additional accused. After giving them opportunity, the learned judge summoned them and added them to the proceedings. Ultimately what is held by the Hon ble apex court is that whenever a person is added as an accused under Section 319, Cr.P.C., the scope of revision petition under Section 397, Cr.P.C. to challenge the said order would be very limited.

11. The facts mentioned in the case of JOGENDRA YADAV (supra) disclose that prior notice had been issued to the four persons sought to be added as additional accused, before including them in the array of parties. By virtue of the notice, they had been asked to show cause as to why they should not be added as additional accused. They were ultimately summoned only after hearing them, that too, by passing a detailed order. In the present case, no such prior notice is issued to the petitioners before being added as accused under Section 319, Cr.P.C.

12. What is ultimately held in the case of JOGENDRA YADAV (supra) is found in paragraph 9 of the judgment and it is reproduced below:

9. It was, however, urged by learned counsel for the appellants that in order to avail of the remedies of discharge under Section 227 of the Cr.P.C, the only qualification necessary is that the person should be accused. Learned counsel submitted that there is no difference between an accused since inception and accused who has been added as such under Section 319 of the Cr.P.C. It is, however, not possible to accept this submission since there is a material difference between the two. An accused since inception is not necessarily heard before he is added as an accused. However, a person who is added as an accused under Section 319 of the Cr.P.C., is necessarily heard before being so added. Often he gets a further hearing if he challenges the sum-morning order before the High Court and further. It seems incongruous and indeed anomalous if the two sections are construed to mean that a person who is added as an accused by the court after considering the evidence against him can avail remedy of

discharge on the ground that there is no sufficient material against him. Moreover, it is settled that the extraordinary power under Section 319 of the Cr.P.C., can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court. It is now settled vide the Constitution Bench decision in Hardeep Singh v. State of Punjab and others {(2014) 3 SCC 92: (AIR 2014 SC 1400)} that the standard of proof employed for summoning a person as an accused under Section 319 of Cr.P.C., is higher than the standard of proof employed for framing a charge against an accused. The Court observed for the purpose of Section 319 of the Cr.P.C., that what is, therefore, necessary for the Court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to the conviction of a person sought to be added as the accused in the case. As regards the degree of satisfaction necessary for framing a charge this Court observed in para 100:-

What is observed in the said case is that the scope of invoking Section 227, Cr.P.C. by an accused who is summoned under Section 319, Cr.P.C. does not arise since the degree of material relied upon by the court summoning him is higher than the materials placed on record in the form of charge sheet.

13. In the Constitutional Bench decision cited supra in the case of HARDEEP SINGH ([2014] 3 SCC 92), the Hon ble apex court has held that Section 319, Cr.P.C. is a discretionary and extraordinary power vested in the court and should be exercised sparingly and only if the circumstances so warrant. The relevant law explained by the Hon ble Supreme Court is found in paragraphs 105 and 106 of the judgment and are reproduced below:

105. Power under Section 319 Cr PC is 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 Cr PC. In Section 319 Cr PC the purpose of providing it 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 Cr PC 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?

13. What is argued by Mr. Rachaiah, learned HCGP is that the decision in the case of HARDEEP SINGH (supra) rendered by a two-Judge Bench also holds the field and therefore, summoning the petitioners under Section 319, Cr.P.C. cannot be called in question. But in the said case, the main focus was in regard to the taking of cognizance and issuing process in terms of Section 204, Cr.P.C.

14. What is held in the case of NAGAWWA (supra) is that is that a person can be summoned under Section 319, Cr.P.C. on the basis of the examination-in-chief and that is also the law explained in the Constitutional Bench decision rendered by the Hon ble Supreme Court in the case of HARDEEP SINGH, but with a rider that there must be a higher degree of proof to summon a person under Section 319, Cr.P.C.

15. Suffice to state that it is always incumbent upon criminal courts to issue prior notice to a person calling upon him or her to show cause as to why he/she should not be made an additional accused. Only on giving an opportunity of being heard, a suitable order should be passed. If the order is passed summoning a particular person in terms of Section 319, Cr.P.C. without giving prior notice, such an order

would not withstand the legal scrutiny. Hence all criminal courts are expected to keep in mind this aspect of the matter as explained by the Hon ble apex court in the case of JOGENDRA YADAV (supra).

16. It need not be reiterated that whenever a person is sought to be summoned as an additional accused in terms of Section 319, Cr.P.C., not only prior notice calling upon him to show cause is to be issued, but also the judge dealing with the case has to take extra caution to satisfy himself/herself that a stronger evidence exists as the basis for taking such action.

17. Hence illegality committed by the learned judge of the trial court in S.C.2/13 in allowing the application filed under Section 319, Cr.P.C is an apparent error inviting the revisional jurisdiction of this court vested under Section 397 of Cr.P.C.

18. In the result, the following order is passed:

## **ORDER**

The revision petition is allowed. The impugned order dated 8.2.2016 passed in S.C.2/13 is set aside. The learned judge is directed to issue prior notice to the petitioners herein calling upon them to show cause as to why they should not be made accused. Only after giving a reasonable opportunity of being heard, a suitable order has to be passed, keeping in mind the observations made by the Hon ble apex court in the Constitutional Bench decision in the case of HARDEEP SINGH .v. STATE OF PUNJAB and OTHERS ([2014] 3 SCC 92) and JOGENDRA YADAV and OTHERS .v. STATE OF BIHAR (AIR 2015 S.C. P.2951).

Registry to circulate a copy of this order to all the Courts for reference, at the earliest.

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