

**Ashok Kumar Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** Dec-23-1997

**Reported in :** 1998CriLJ2777

**Judge :** J.C. Mishra, J.

**Acts :** [Evidence Act, 1872](#) - Sections 3, 58, 137 and 299 ; Evidence (Amendment) Act, 1972 - Sections 31 and 33; Code of Criminal Procedure (CrPC) (CrPc), 1974 - Sections 319, 319(1) and 319(4); Code of Criminal Procedure (CrPC) (CrPc) - Sections 351;

**Appeal No. :** Criminal Revision Nos. 17559/86, 1927 of 1987 and 16,1291 of 1988

**Appellant :** Ashok Kumar

**Respondent :** State of U.P.

**Advocate for Def. :** A.G.A.

**Advocate for Pet/Ap. :** P.M.N. Singh, Adv.

**Disposition :** Revision dismissed

**Judgement :**

ORDER

**J.C. Mishra, J.**

1. These revisions have been filed by the revisionists challenging the orders passed under Section 319, Cr. P. C. summoning them to face trial. The common point that has arisen in these cases is whether the Court can summon the accused, against whom no evidence was collected during the investigation, only on the strength of the statement of prosecution witness, who was not cross-examined. In these cases the prosecution witness was examined by the prosecution wherein he disclosed the complicity of the applicant in the crime. The Presiding Officer without giving opportunity to the accused persons, who were already facing trial, to cross-examine the witness summoned the revisionists.

2. counsel contended that since the witness was not cross-examined his statement could not be treated as evidence and, therefore, on the basis of uncross-examined testimony the accused could not be summoned. He contended that the Court concerned committed illegality in summoning the applicant.

3. I have heard counsel for the revisionists and learned Additional Government Advocate.

4. For appreciation of the central core of the controversy Section 319, Cr. P. C. is reproduced below :-

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 afresh and the witnesses reheard;

(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.

5. On a plain reading of Sub-section (1) of Section 319, Cr. P. C. there can be no doubt that if it appears from the evidence tendered in the course of any inquiry or trial that any person, not being the accused, has committed any offence, for which he could be tried together with the accused, can be summoned. This power can be exercised only, if it so appears from the evidence at the trial and not otherwise. Therefore, this Sub-section contemplates existence of some evidence appearing in the course of trial where from the Court can prima facie conclude that the person, not arraigned before it, is also involved in the crime, for which he can be tried with those already named by the police. Even a person, who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code. *Kishun Singh v. State of Bihar* 1993 JIC 445.

6. It appears that there is conflict of opinion on the vital question whether a person can be made accused on the strength of un-cross-examined testimony under Section 319, Cr. P. C.

7. In *Sarnam Singh v. State of U.P.*, reported in 1987 AWC 1036 : (1987 All LJ 910) decided by Hon'ble B. L. Yadav, J. single Bench referred to 41st Report of the Commission which is quoted below at page 911 (All LJ) :

It happens sometimes, though not very often that 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. It is only proper that a Magistrate should have the power to call and join him in the proceedings. Section 351 (of the Old Code) provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision under Section 351 for summoning such a person if he is not present in Court. Such a provision would

make Section 351 fairly comprehensive and we think it proper to expressly provide for that situation.

8. The learned single Judge then proceeded to observe that 'it is, therefore, abundantly clear that the object of the markers of the statute in enacting Section 319 of the Code was to provide for a more comprehensive provision with considerable improvement in the old Section 351, for proceeding against other persons appearing to be guilty, although he is not an accused. Section 319 of the Code provides that where in the Court in an enquiry or trial of an offence, if it appears from the evidence that any person not being accused has committed any offence, Court may proceed against such person for the offence which he appears to have committed. The intention of the legislature in enacting Section 31 appears to be that if somebody other than the person who is party and facing trial or enquiry is also an accused he may be summoned on the basis of some evidence available on the record.

9. The learned Judge rejected the argument that examination-in-chief of a witness would not be said to be evidence and observed that 'it was submitted that only the examination-in-chief of a witness would not be said to be evidence but I do not agree with that submission. The inclusive definition of word 'evidence', has been given under Section 3 of the Indian [Evidence Act, 1872](#) which means and includes all statements which the Court permits or requires it to be made by the witnesses, before it in relation to matters of fact under an enquiry. It is, therefore, evident that the statements which are permitted by the Court to be made or the Court requires to be made before it is called oral evidence. If something positive has been stated in the Examination-in-Chief by a witness that also is evidence and is sufficient for the purpose of Section 319 to proceed against the person against whom statement has been made. It cannot be said that unless cross- examination and re-examination has been made, statement made in Examination-in-Chief cannot be said to be evidence. Even though cross-examination of a witness was done nevertheless any Court can scrutinise the statement in chief portion and ascertain its veracity. Truthfulness of a statement can be assessed even from statement- in-chief portion.

10. The learned Judge concluded that it cannot be said that unless cross-examination and re-examination of the statement are made the examination-in-chief cannot be said to be evidence. Even though cross-examination of a witness was not done nevertheless any Court can scrutinise the statement-in-chief portion and ascertain its veracity, he relied on a Division Bench of this Court in *Ambika Singh v. State* 1961 Cri LJ 15 : (1960 All LJ 782) para 20 which held that truthfulness of a statement can be assessed even from statement-in-chief portion.

11 In *Ram Niwas v. State of U.P.*, reported in 1990 Cri LJ 460 : (1989 All LJ 72) the contention of the revisionist that the accused could not be summoned on the basis of the statement-in-chief was not accepted and it was held that the order does not suffer from any illegality with the observation that a combined reading and close scrutiny of the definition of the cross-examination given in Section 3 and Section 137 of the Evidence Act respectively and provisions contained in Section 319, Cr. P. C. reveal that the applicant who was summoned under Section 319, Cr. P. C. became an adverse party only after he was summoned. Thus his right of cross-examination would flow only after the witnesses are 're-heard', since the proceedings had to commence afresh as against him. It is, therefore, of no consequence whether the statements of the witnesses relied on by the trial Judge for summoning the applicant were recorded after examination-in-chief or after cross-examination or re-examination. In any case the said statement is 'evidence' all right which could have been used by the trial Judge.

12. In *Marghoobul Hasan v. State of U.P.* 1988 Cri LJ 1467, similar view was taken by this Court that a person may be made accused on the strength of the uncross-examined testimony of a witness. This question again arose for consideration in *Irshad v. State of U.P.* 1996 Cri LJ 749 in which relying on the aforesaid decision it was held that contention of counsel for the revisionist cannot be sustained that cross-examination should be a condition precedent prior to summoning of the additional accused persons named in the F.I.R. but subsequently dropped during investigation. Section 319, Cr. P. C. provides jurisdiction to the trial Court to include some other persons when prima facie case against whom is established. It was observed that cross-examination of such witness is not required at this stage.

13. The learned counsel for the revisionists referred to the decisions of this Court in Mohd. Ali v. State of U.P. 1990 UP Cri R 251, Dileep Singh v. State of U.P. 1996 (33) ACC (HC) 45 and Surendra Kumar Saxena v. State of U.P. 1996 (33) ACC (HC) 51 in support of their contention that the powers under Section 319, Cr. P. C. cannot be exercised unless the cross-examination of the witnesses is complete.

14. Recently the matter came up for decision before Hon'ble S. K. Phaujdar, J. in Criminal Misc. Application No. 1829 of 1995 Ram Gopal v. State of U.P. decided on 17th July, 1995.

He referred to the conflicting decisions of this Court, some of which have been noted above and referred the matter to a large Bench. An enquiry from the office has revealed that despite the order of the Hon'ble Chief Justice nominating the Bench presided over by Hon'ble G. P. Mathur, J. the said case has not yet been listed. In reference order the Hon'ble Judge has expressed his view on the interpretation of the term 'evidence' as contained in Section 319, Cr. P. C. which is reproduced below :-

I am now coming to the term 'evidence' as used in the Indian Evidence Act, 1972. In this Act, the term 'evidence' has been defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses in relation to the matters of fact under enquiry as also all evidence produced for inspection of the Court. This definition, of course, is not complete as it is silent about any dying-declaration, statement of co-accused, materials produced for inspection or prior admission of a party which are also matters on which the Courts do rely to come to a finding and are evidence in the broad sense of the term. This term evidence again has been used in various sections of Evidence Act with different connotations. Section 33 of the Evidence Act permits evidence given by a witness in a judicial proceeding to be used in a subsequent judicial proceeding or in a later stage of the same judicial proceeding provided the adverse party in the first proceeding had the right of opportunity to cross-examine him. We may stop here for the time being. If evidence would only mean such statement as has been tested by the cross-examination, then there was no

necessity of adding this proviso that the 'adverse party in the first proceeding had the right and opportunity to cross-examine.' This only suggests that there could be an evidence even without cross-examination, but, for Section 33 only, such evidence may not be read at a subsequent stage etc. unless there was a right and opportunity of the other party to cross-examine. The Evidence Act forbids acceptance of hearsay evidence if we go by the strict interpretation of the term evidence, that a statement is not evidence unless tested by cross-examination, then in examination-in-chief there should not be any bar to accept a hearsay which could only be discarded after cross-examination. Section 58 of the Evidence Act says that the facts admitted need not be proved. It only means that when the facts are admitted by the party, either party may not be allowed even to lead evidence on that point, i.e. such evidence may not be admitted in the examination-in-chief or may only be discarded after cross-examination. The purpose of this discussion was to illustrate that evidence for the purpose of final judgment always means the evidence tested by cross-examination, but there are (?) other occasions where evidence has been used in the sense of statements made before the Court during a proceeding. At this juncture we may again look to the purpose and procedure under Section 319, Cr. P. C. As already indicated the purpose of summoning a person under Section 319, Cr. P. C. is that he may be tried together with an accused already on record. Once he appears the witnesses are to be reheard, when a witness, on whose statement a man is summoned is called afresh I find no rational for waiting for the cross-examination of that witness before exercising the power under Section 319, Cr. P. C. Even though the witness would have been examined and cross-examined before an order under Section 319, Cr. P. C was passed the whole process had to be repeated as provided in Section 319(4)(a), Cr. P. C. and there would be no prejudice either to the accused already on trial or to the person summoned under Section 319, Cr. P. C. if action is taken only on the examination-in-chief of a witness.

15. Analysis of the pronouncements referred to above would indicate that some Benches have taken narrow view that since the evidence includes examination-in-chief, cross-examination and re-examination unless a witness is cross-examined by the adverse party his statement can not be held to be evidence and consequently the ingredients of Section 319, Cr. P. C. are not attracted. In my

opinion, this view is not correct. A reading of Code of Criminal Procedure would indicate that 'evidence' has been used in different context in different sections and, therefore, 'evidence' should be interpreted in the context it has been used in the relevant provision.

16. In this regard reference may be made to Section 299 which permits recording of evidence in absence of an accused. It provides that if it is proved that an accused person has absconded and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of may, in his absence, examine the witnesses produced on behalf of the prosecution and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. Thus in view of this provision evidence of a witness, who would not be cross-examined can be taken into consideration by the Court in the circumstances mentioned in the aforesaid provisions.

17. In the matter before us even if a witness is cross-examined that would be of no avail to the accused person who can be summoned under Section 319, Cr. P. C. as the other accused would not be able to cross-examine the witness in a way suitable to him and would not give any benefit to that person. It is for this reason the proceeding in respect of such person has to be commenced afresh and the witness is reheard. This requirement makes it abundantly clear that the evidence in Sub-section (1) of Section 319, Cr. P. C. has been used in a limited sense.

18 Hon'ble B. L. Yadav, J. in *Sarnam Singh v. State of U.P.* 1987 AWC 1036 : (1987 All LJ 910); Hon'ble Palok Basu, J. in *Ram Niwas v. State of U.P.* 1990 Cri LJ 460 : (1989 All LJ 72) and Hon'ble S. K. Phaujdar, J. in *Criminal Misc. Application No. 1823 of 1995 Ram Gopal and another v. State of U.P.* have given sound reasonings that 'evidence' in Section 319, Cr. P. C. has been used in a limited sense and does not necessarily include cross-examination or re-

examination. It needs no repetition that evidence in various provisions of Code of Criminal Procedure has been used in different sense and would not necessarily include cross-examination and re-examination. It is true that Hon'ble S. K. Phaujdar, J. in a case before him has referred the matter to the larger Bench but I am of the opinion that in view of the pronouncement of the Division Bench in *Ambika Singh v. State* 1961 Cri LJ 15 : (1960 All LJ 782) that a Court is not precluded to assess the veracity of a witness even in absence of cross-examination it is not necessary to wait for the decision of the larger Bench. The aforesaid view which appears to me reasonable and is supported by a Division Bench decision I have no hesitation in holding that an accused who was not named in the F.I.R. and if named, was discharged after investigation can be summoned under Section 319, Cr. P. C. if the Court is satisfied on the evidence of a witness though he was not at all cross-examined that he also committed an offence. Thus the Courts concerned committed no illegality in summoning the revisionists under Section 319, Cr. P. C.

19. The revisions are dismissed.

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