

ORDERS ON APPLICATION

1. This order is passed on the application filed by the learned Special Public Prosecutor under Section 319(4)(a) of the Code of Criminal Procedure, 1973, seeking recall/re-examination of the prosecution witnesses already examined in the present case, consequent upon the order passed under Section 319 Cr.P.C. whereby certain persons have been brought on record as additional accused.
2. It is contended that the present case arises out of a serious occurrence involving the alleged commission of offences including murder. Initially, the investigation culminated in filing of charge-sheet against certain accused persons and the trial proceeded against them.
3. During the course of trial, evidence came on record indicating the alleged involvement of persons who were not originally arraigned as accused. On consideration of the evidence brought before the Court, an application under Section 319 Cr.P.C. came

to be considered and the persons against whom the requisite satisfaction was recorded were ordered to be proceeded against as additional accused.

4. The said order has been challenged before the superior Court and the same has been upheld.
5. Consequent upon the addition of the accused, the learned Public Prosecutor has now sought recall/re-examination of the prosecution witnesses, contending that in view of Section 319(4)(a) Cr.P.C., the proceedings in respect of the newly added accused are required to commence afresh and the witnesses are required to be re-heard.
6. The prosecution has therefore sought recall of the prosecution witnesses already examined, in omnibus.
7. The application is opposed by the learned counsel appearing for the original accused as well as by the learned counsel appearing for the newly added accused, to the extent and in the manner stated in their respective objections.

8. After having heard the arguments on all parties and the below mentioned point arises for consideration before this Court.

POINTS

1. Whether, consequent upon the addition of accused under Section 319 Cr.P.C., the proceedings in respect of such accused are required to commence afresh and the witnesses are required to be re-heard in terms of Section 319(4)(a) Cr.P.C.?
 2. Whether the prosecution is entitled, as a matter of course, to recall each and every prosecution witness already examined, irrespective of whether the evidence of such witness contains any material having bearing upon the newly added accused and what procedure is required to be adopted so as to balance the statutory right of the newly added accused with the right of the existing accused to a fair and expeditious trial?
 3. What order?
9. My findings on the above point as is follow;

Point No.1: In the Affirmative.

Point No.2: Partly in the Affirmative.

Point No.3: As per below mentioned
order for the following reason,

REASONS

10. **POINT NOS.1 & 2.** Section 319(4)(a) Cr.P.C. provides that where the Court proceeds against any person under Section 319(1), the proceedings in respect of such person shall be commenced afresh and the witnesses shall be re-heard. The provision is not merely procedural in a narrow sense. It is intended to protect the newly added accused from being prejudiced by evidence which had already been recorded in his absence.

11. The newly added accused persons were not before the Court when the earlier evidence was recorded. They had no opportunity to participate in the proceedings, instruct their counsel, cross-examine the witnesses or otherwise defend themselves. Consequently, the evidence already recorded cannot simply be treated as substantive evidence against such newly added accused without complying with the mandate of Section 319(4)(a).

12. The Hon'ble Supreme Court in Shashikant Singh v. Tarkeshwar Singh, (2002) 5 SCC 738, has held that

the safeguard contained in Section 319(4) is mandatory and that, after addition of an accused, the proceedings in respect of such accused have to commence afresh and the witnesses have to be re-heard. Further it appears fresh examination-in-chief and not merely tendering the earlier evidence for cross-examination is the requirement of the provision. The principle has also been reiterated in subsequent decisions of the Hon'ble Supreme Court. The statutory object is to place the newly added accused in the same position, as far as the trial is concerned, as an accused who was before the Court from the commencement of the proceedings.

13. The Hon'ble Supreme Court in *Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92, while examining the scope of Section 319, has explained that the power is extraordinary and must be exercised judiciously. Further it appears at the same time, once the power is exercised and a person is brought before the Court as an accused, the procedural safeguards available under the Code cannot be denied to him.

14. Likewise, in *Sukhpal Singh Khaira v. State of Punjab*, (2023) 1 SCC 289, the Hon'ble Supreme Court reiterated that when an additional accused is summoned under Section 319, the proceedings in respect of such person have to commence afresh and the witnesses have to be re-examined in his presence. Further it appears that the evidence recorded earlier cannot simply be used against the subsequently summoned accused in view of the statutory scheme and the requirement of a fair trial. Therefore, there can be no doubt that the newly added accused are entitled to the protection contemplated by Section 319(4)(a) Cr.P.C.

15. Now the question arises before this court "Whether every witness must mechanically be recalled"? and in this behalf, the statutory expression is that the proceedings in respect of the newly added accused shall commence afresh and the witnesses shall be re-heard. The object is to ensure that the newly added accused receives a meaningful and effective opportunity to meet the evidence against

him. However, the provision cannot be understood separate from the actual evidence and the facts of the case.

16. The Court has to distinguish between:

- (a) a witness whose testimony contains material incriminating the newly added accused;
- (b) a witness whose testimony is wholly irrelevant to the newly added accused;
- (c) a formal witness whose evidence has no bearing upon the role attributed to the newly added accused; and
- (d) a witness whose evidence is material only for proving a particular circumstance or document but whose testimony has no direct bearing upon the newly added accused.

17. The purpose of Section 319(4)(a) is not to confer upon the prosecution an unrestricted opportunity to reproduce the entire trial mechanically. Its purpose is to ensure a legally valid trial of the newly added accused.

18. At the same time, the Court cannot adopt a procedure whereby evidence already recorded is selectively treated as substantive evidence against the newly added accused while denying him the opportunity contemplated by Section 319(4)(a).

19. Thus, the guiding consideration must be whether the evidence of the particular witness is required to be brought afresh for adjudication of the case against the newly added accused.

20. The distinction between the right of the newly added accused and convenience of the prosecution, in this behalf it appears, the newly added accused cannot be placed at a disadvantage merely because the trial had substantially progressed before he was brought on record.

21. The fact that PW-1 to PW-27 have already been examined cannot, by itself, deprive the newly added accused of the statutory protection under Section 319(4)(a).

22. Equally, the prosecution cannot contend that every witness must be recalled without the Court examining the nature and relevance of the evidence.

23. The Court must therefore adopt a procedure which preserves both:

(i) the statutory right of the newly added accused to a fair trial; and

(ii) the requirement that the trial should not be unnecessarily prolonged by wholly irrelevant or repetitive proceedings.

24. And in regard to the effect of the earlier evidence; It is further made clear that the evidence earlier recorded before the newly added accused entered the proceedings cannot, merely because it is already available on record, be treated as evidence recorded in his presence.

25. The newly added accused was not in a position to cross-examine the witnesses at that stage.

26. The Supreme Court has repeatedly emphasised that the newly added accused must be afforded the opportunity contemplated by Section 319(4), and that

merely tendering an earlier examination-in-chief for cross-examination would not ordinarily satisfy the statutory mandate where a fresh trial is required.

Consequently, the Court has to ensure that the evidence which is intended to be relied upon against the newly added accused is recorded in accordance with law and in his presence.

27. Further more the role of the existing accused is that whether the original accused should be excluded from the proceedings when a witness is re-examined consequent upon Section 319.

28. In the opinion of this Court, such exclusion would not be appropriate. The original accused continue to be accused in the same case. The newly added accused do not constitute a separate prosecution case disconnected from the original occurrence. The evidence relating to the occurrence, the overt acts, the common object/common intention, the identity of the assailants, the medical evidence, the investigation and other circumstances may have overlapping relevance. Therefore, when a material prosecution

witness is re-examined/re-heard pursuant to Section 319(4)(a), the existing accused cannot be deprived of their procedural rights in relation to that evidence.

The Court shall accordingly ensure that the right of cross-examination of the original accused is also preserved in accordance with law.

29. Further it is observed no general omnibus order can be passed in favour of prosecution as to the above behalf. In the peculiar facts and circumstances of the present case, where a substantial number of witnesses have already been examined and the prosecution seeks omnibus recall of witnesses in a generalised manner, this Court is of the considered opinion that a mechanical direction to recall every witness without examining the relevance of each witness to the newly added accused would not be the proper exercise of judicial discretion.

30. The Court must first identify the witnesses whose testimony contains material concerning the newly added accused.

31. For this purpose, the learned Special Public Prosecutor shall furnish a witness-wise chart indicating:

1. the name and number of the charge sheet witness (prosecution witness) and the substance of the evidence already recorded;
2. the particular portion/material relied upon against each newly added accused.

Thereafter, the Court shall pass appropriate orders regarding recall/re-examination of the concerned witnesses.

32. It is further observed that the safeguard to the newly added accused; Whenever a material witness is recalled pursuant to this order, the examination-in-chief shall be recorded afresh to the extent required by law and the newly added accused shall have full and effective opportunity of cross-examination.

33. The earlier deposition shall not be treated as a substitute for the fresh examination where such fresh examination is required by Section 319(4)(a).

The newly added accused shall also be supplied with the necessary papers and material in accordance with law and shall be given reasonable opportunity to prepare for cross-examination.

34. Further it is observed that no prejudice to the original accused; At the same time, the original accused shall not be prejudiced by the procedure adopted pursuant to this order.

35. Where the fresh evidence is recorded concerning the same occurrence and contains material relevant to the case against the original accused, their right of cross-examination shall remain intact.

36. The Court shall ensure that the procedure adopted does not result in any accused being deprived of an effective opportunity to challenge the prosecution evidence.

37. It is further clarified that this Court is not reconsidering the correctness of the order by which the additional accused have already been summoned under Section 319 Cr.P.C. That issue has attained the stage indicated by the order of the superior Court and

is not open for reconsideration in the present application.

38.The present order is confined to determining the procedure to be followed for giving effect to Section 319(4)(a) Cr.P.C. and for ensuring a fair trial.

39.This Court is also not conducting any assessment at this stage as to whether the newly added accused are ultimately guilty or innocent. The ultimate appreciation of evidence shall be undertaken only after the entire evidence is properly recorded and the parties are given their full opportunity of defence.

40. Further it is observed that the object of criminal procedure is not merely to secure conviction but to ensure a fair adjudication in accordance with law.

41.Section 319 is intended to prevent a person against whom sufficient evidence emerges during trial from escaping adjudication merely because he was not originally charge-sheeted. Equally, the provision protects such subsequently added accused by requiring the proceedings concerning him to commence afresh and the witnesses to be re-heard.

Thus, both aspects have to be harmoniously given effect thereto. The Court must neither dilute the statutory protection granted to the newly added accused nor permit the procedure to become unnecessarily cumbersome by mechanically reproducing evidence which has no relevance whatsoever to him.

42. For the foregoing reasons, this Court holds accordingly on point No.3, that:

1. The newly added accused are entitled to the protection and procedural safeguards contained in Section 319(4)(a) Cr.P.C.
2. The evidence earlier recorded in the absence of the newly added accused cannot, merely by virtue of being already on record, be treated as evidence recorded against them without following the procedure mandated by law.
3. The prosecution application seeking general recall of witness is not liable to be allowed mechanically in its entirety, unless shown cause as to the above.

4. The learned Special Public Prosecutor shall submit a witness-wise statement identifying the witnesses whose evidence contains material relevant to the newly added accused and explaining the necessity for their recall.

5. The material prosecution witnesses shall thereafter be recalled and examined afresh in accordance with Section 319(4)(a) Cr.P.C., and the newly added accused shall be afforded full and effective opportunity of cross-examination.

6. The rights of the original accused to cross-examine the witnesses in accordance with law shall also be dealt in.

7. Formal or wholly irrelevant witnesses need not be recalled merely as a matter of formality, where their evidence has no bearing upon the case against the newly added accused, subject always to the requirement that no evidence already recorded in the absence of the newly added accused is treated as substantive evidence against them contrary to Section 319(4)(a).

43. Further this Court shall thereafter proceed with the trial expeditiously and in accordance with law. Accordingly, the application is partly allowed in the above terms.

IV Addl. D. & S. Judge, Bagalkot.