

In the Court of Sessions Judge, Mahoba.

Session Trial No.-16/2019

I.A. No.-01/2019

State of U.P. Vs. Khem Chandra alias Phullu & others
Crime No.-249/2018
Section-304, 201 I.P.C.
P.S.-Panwari, District-Mahoba.

02.11.2020**Disposal of Application No.-25Kha**

An application No. 25Kha has been moved by the complainant of the case Arvind Sen under Section 319 Cr.P.C. It has been stated in the said application that prosecution witness i.e. complainant of the case Arvind Sen P.W.-1, Smt. Poonam P.W.-2 and Murat Dhvaj P.W.-3 have been examined. In the complaint submitted to the police station it has been stated that Maiyadeen and Rameshwar were involved in committing the crime and the P.W.-1 to P.W.-3 have also stated the involvement of these accused persons in their statement recorded under Section 161 Cr.P.C. The statements given on oath in the Court have also revealed the transaction of money behind the murder of Dharmendra at the hands of Rameshwar, Maiyadeen, Anil Khangar and Khemchandra. However, the investigating officer of the case has submitted the charge-sheet against Anil Khangar and Khemchandra, whereas the names of the Rameshwar and Maiyadeen have been dropped in the case. The names of Anil Khangar and Khemchandra has come to light during the course of investigation. Hence, both the accused persons Rameshar and Maiyadeen are liable to be summoned for trial.

Heard Ld. D.G.C.(Cri.) and Ld. counsel for the accused persons on application 25Kha and perused the record.

According to the complaint, the issue of the death of Dharmendra i.e. brother of Arvind Sen, the complainant, happened under unnatural circumstances. The dead body of the deceased was found to be between Mahua-Bharwara Road in the corner of pit on

dated 15.11.2018. There were mark of assault on the body of deceased. The F.I.R. of the case was lodged by complainant on the premise of that deceased Dharmendra was working with the contractor Maiyadeen Kushwaha and Rameshwar for last one and half year. On the eve of Diwali, the deceased came to visit his house and disclosed that the accused persons did not pay his wages for last one year. On the date of incident, the deceased was working with these contractors on road work at the site of Village Damaura. On dated 14.11.2018 the deceased carried coaltar and timber to village Satari in the autorikshaw. In the said Auto Anil Khagar and co-accused Fallu Anuragi accompanied him and reached village Satari. On the said day the deceased did not reach home and on dated 15.11.2018, an information was received on telephone that his body is lying on pit on road side. On being inquired from auto owner Anil and accused Phullu, it was stated that, the deceased got down at 10.00 p.m. at the house of contractor Maiyadeen, village Sungira. On this basis, it has been stated by the complainant that his brother was assaulted mercilessly and was murdered for not paying the wages for one year and his dead body was thrown between Bharwara and Mahua on road side. On the basis of the statement made in the complainant, an F.I.R. was lodged against Maiyadeen Kushwaha and Rameshwar.

The prosecution witnesses namely Arvind Sen P.W.-1 and Smt. Poonam P.W.-2 have stated on oath that the deceased Dharmendra was working with Maiyadeen and Rameshwar Kushwaha for about one and a half year. Rameshwar Kushwaha and Maiyadeen were working for construction and maintenance of Roads. On the occasion of Dipawali Dharmendra visited his home and stated that, the contractor has paid him a sum of Rs. 1000/- and the balance amount was stated to be released on the completion of work. Dharmendra has also stated that, he was not paid his wage for about one and half year. Rameshwar and Maiyadeen accompanied Dharmendra from house to workplace, thereafter, finishing the work at Damaura they headed towards Satari in a Tempo with Khemchandra @ Phallu and Anil Khangar to collect wood and oil and then Dharmendra gave a

telephone call to the complainant P.W.-1 that he has reached at Satari at about 8.30 p.m. Dharmendra also stated that the contractor will clear the entire amount of wages by tonight and a similar phone call was given to Smt. Poonam P.W.-2. Dharmendra also stated in telephone to P.W.-2 that he shall be staying tonight at the house of Maiyadeen in village Sungira and will return next morning. Both Khemchandra and Anil Khangar were also working with the contractors Rameshwar and Maiyadeen and used to transport their logistics from time to time. It was the next day morning of 15.11.2018 that the dead body of Dharmendra was reported to be lying in a pit near the road side between village Mahua and Bharwara.

There is another witness namely Murat Dhawaj P.W.-3, who is a press reporter, and gave a written complaint on 15.11.2018 at police station Panwari, stating therein, that an unknown dead body is lying near the canal Bharwara and Kunhara Road side. He tried to find out the identity of the dead body but could not succeed. Hence, he is a witness to inform to the police station regarding the dead body of Dharmendra, which was lying near the canal Bharwara and Kunhara Road side.

The statement given by the brother of deceased and wife of deceased have established that the deceased Dharmendra was working with contractors namely Rameshwar Kushwaha and Maiyadeen Kushwaha. It has also come on record that the wages of deceased Dharmendra were not paid by the contractors Rameshwar Kushwaha and Maiyadeen for about one and a half year, except a sum of Rs. 1000/-. It has also come on evidence that the deceased has been in the company of Maiyadeen, Khemchandra and Anil Khangar on the fateful day of 15.11.2018. It has also come on evidence that the deceased Dharmendra used to pickup and de-load down coaltar and timber with the accused persons for civil construction and road work of the contractors. The marks of wheels of Auto Rikshaw used by them have also been found on the place of incident. Bases on these facts the I.O. found the complicity of these prospective accused persons. However, the I.O. dropped their names while filling the charge-sheet.

The Learned D.G.C.(Cri.) relied upon the judgments of Hon'ble Supreme Court in the matter of **Saeeda Khatoon Arshi Vs State of U.P. and another (2002) Supreme Court Cases 323**, where in the Hon'ble Supreme Court held as under:-

“29. The order of the Additional Sessions Judge dated 29 January 2019 for summoning the second respondent was on the basis of the evidence which emerged during the course of the trial. The order summoning the second respondent was on a careful evaluation of the evidentiary material and based on the principles laid down in the decision of the Constitution Bench in Hardeep Singh. The Additional Sessions Judge furnished reasons for relying on the provisions of Section 114 of the Evidence Act having due regard to the fact that the incident had taken place within the confines of the matrimonial home where only the second respondent and the deceased were residing on the night when the incident took place.

30. The order passed by the Additional Sessions Judge did not suffer from any infirmity. On the contrary, it was the High Court which interfered with the findings of the Trial Court on the specious ground that the trial was proceeding against Manoj Shrivastav for an offence under Section 306 and that the Trial Court had merely engaged in an exercise of exploring the possibility as to the cause of death. Section 319 empowers the court to proceed against a person appearing to be guilty of an offence where, in the course of any enquiry 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 exercise of the discretion by the Additional Sessions Judge to summon the second respondent fulfilled the requirements of Section 319 and was consistent with the parameters laid down in the decisions of this Court noted earlier. The fact that a protest petition had not been filed by the appellant when the report was submitted under Section 173 did not render the court powerless to exercise its powers under Section 319 on the basis of the evidence which had emerged during the course of the trial. The evidence of PW-1 and PW-2 which has been adverted to above meets the threshold required to sustain an order for summoning under Section 319. The High Court has failed to analyse the basis on which the Additional Sessions Judge had proceeded to issue summons under Section 319 and in a brief set of observations covering a few sentences displaced a well-considered order of the Additional Sessions Judge in purported exercise of the jurisdiction under Section 482. The order passed by the High Court is unsustainable and would accordingly have to be set aside.”

Rajesh & Ors. Vs the State of Haryana (2018)

SCC Online PNH 5035, where in the Hon'ble Supreme Court held as under:-

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned Trial Court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed herein above, the appellants herein were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, P.W.1 and P.W.2 have specifically stated against the appellants herein and the specific role is attributed to the accused-appellants herein. Thus, the statement of P.W.1 and P.W.2 before the Court can be said to be evidence during the trial and, therefore, on the basis of the same and as held by this Court in the case of Hardeep Singh (supra), the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the Courts below to summon the appellants herein to face the trial in exercise of power under Section 319 of the CrPC.

10. In view of the above and for the reasons stated above, we see no reason to interfere with the impugned judgment and order passed by the High Court confirming the order passed by the learned Magistrate summoning the accused-appellants herein to face the trial in exercise of the power under Section 319 of the CrPC. We are in complete agreement with the view taken by the High Court. No interference is called for by this Court. In the facts and circumstance of the case and for the reasons stated hereinabove, the present appeal fails and deserves to be dismissed and is accordingly dismissed.”

S. Mohammed Ispahani v. Yodendra Chandak

(2017) 16 SCC 226, where in the Hon'ble Supreme Court held as under:-

"35. It needs to be highlighted that when a person is named in th FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court

finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

Hardeep Singh Vs. State of Punjab (2014) 3

SCC 92, where in the Hon'ble Supreme Court held as under:-

“12. Section 319 CrPC springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13. 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. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

17. Section 319 CrPC 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 CrPC 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.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the

court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.”

Having considered the fact that sufficient evidence has come on record i.e. to say that the statement given by the brother of deceased and wife of deceased have established that the deceased Dharmendra was working with contractors namely Rameshwar Kushwaha and Maiyadeen Kushwaha. It has also come on record that the wages of deceased Dharmendra were not paid by the contractors Rameshwar Kushwaha and Maiyadeen for about one and a half year, except a sum of Rs. 1000/-. It has also come on evidence that the deceased has been in the company of Maiyadeen, Khemchandra and Anil Khangar on the fateful day of 15.11.2018. It has also come on evidence that the deceased Dharmendra used to pickup and de-load down coaltar and timber with the accused persons for civil construction and road work of the contractors. The marks of wheels of Auto Rikshaw used by them have also been found on the place of incident. Bases on these facts the I.O. found the complicity of these prospective accused persons.

Hence on the basis of the evidence and the law, the proposed accused persons are likely to be convicted in all probability, if appropriate additional evidence is brought on record, therefore summons are issued against them to be tried in case crime No.-249/2018, under Sections 304, 201 I.P.C. P.S. Panwari, District Mahoba and the application No.-25Kha is liable to be allowed. Hence allowed.

Order

The application No.-25Kha is allowed and the summons are issued against the proposed accused Rameshwar and Maiyadeen in Case Crime No.-249/2018, u/s 304, 201 I.P.C., P.S. Panwari, District Mahoba. Put up the case for framing of charge on 18.11.2020.

(Harvir Singh)
Sessions Judge,
Mahoba.