

Before D. S. Tewatia, J.

AMARJIT SINGH,—Petitioner.

versus

STATE OF PUNJAB and another,—Respondents.

Criminal Misc. No. 3762-M of 1982.

November 17, 1982.

*Code of Criminal Procedure (II of 1974)—Sections 173, 239 and 319—Number of accused sent up by the police for trial—Magistrate discharging one of them under section 239—In the course of trial of the remaining accused the discharged person also summoned to stand trial alongwith the others—Such person—Whether could be regarded as a person “not being an accused” and ordered to be tried under section 319.*

*Held, that section 319 of the Code of Criminal Procedure, 1973 authorises a Court to summon a person as an accused if the evidence before it shows that such person had committed any offence for which he could be tried together with the persons who are already being tried as an accused. That means till such time evidence of the kind is before the Court the question of summoning a person not being the accused does not arise, so, it would be at the stage when the evidence is being adduced before the court that it would consider that the person implicated by the evidence is being tried as an accused before it or not. If such a person is not being tried as an accused, then that person can be summoned to be so tried even though that very Court earlier had discharged him under section 239 of the Code on the basis of the material placed before the Court in the form of a report under section 173 of the Code. (Para 7).*

*Petition Under Section 482 of the Code of Criminal Procedure, 1973 (No. 2 of 1974) praying that the impugned order may kindly be quashed and the proceedings may kindly be stayed in the trial Court.*

Ujagar Singh, Advocate with R. P. Bhatia, Advocate, for the Petitioners.

P. S. Kang, Advocate, for the Respondents.

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JUDGMENT

D. S. Tewatia, J. (Oral).

(1) The primary question that falls for determination in this case is as to whether a person named in the F.I.R. as an accused and challaned by the police, but discharged by the Magistrate under section 239, Cr. P.C. could be considered to be a person 'not being an accused' and summoned by the very Court by virtue of the provisions of section 319, Cr. P.C. to be tried along with other accused.

(2) For appreciating the somewhat significant law question posed above, it needs noticing only a few relevant facts which can be stated thus:—

(3) Three persons namely Amarjit Singh alias Amba, the petitioner herein, Jaswinder Singh *alias* Chama and Balram Singh were challaned by the police under section 326 read with section 34, I.P.C. The trial Court after considering the relevant documents i.e., F.I.R., Statements under section 161, Cr. P.C. etc., held that no case was made out against Amarjit Singh *alias* Amba and,—*vide* order, dated 2nd July, 1981, discharged him. When the trial proceeded against the other two accused and one of the witnesses namely Santosh Kumari complainant in her examination-in-chief attributed a positive act of criminality to Amarjit Singh, the prosecution moved an application for summoning Amarjit Singh as an accused to face the trial along with other two accused. The Chief Judicial Magistrate,—*vide* his order, dated 25th January, 1982 dismissed the application. This order was challenged in revision petition before Sessions Judge, Ropar, who by his order, dated 14th June, 1982 set aside the order, dated 25th January, 1982 and granted the application of the prosecution for summoning Amarjit Singh as an accused. It is this order which has been impugned by the petitioner through the present petition on two grounds, *inter alias*, (i) that unless the order, dated 2nd July, 1981, whereby the petitioner was discharged by the trial Court is set aside the petitioner could not be summoned as an accused in the case, (ii) That mere examination-in-Chief statement of Santosh Kumari cannot be considered 'evidence' which could be taken into consideration for deciding as to whether the person implicated is to be summoned or not.

(4) On behalf of the State it is being urged that provisions of Section 319, Cr. P.C. enabled the Court, to summon a person who

was not an accused before it, for trying him as an accused in the case along with other accused and that petitioner Amarjit Singh having been discharged by the trial Magistrate he was not an accused either when the trial of the remaining accused commenced or at the stage at which the prosecution moved an application for summoning him as an accused in the case. Support for the aforesaid submission was sought from a Supreme Court decision reported in *Joginder Singh v. State of Punjab* (1).

(5) In the aforementioned case the facts were that the police out of persons named in the F.I.R. had challaned only three and the names of other two persons were mentioned in column No. 2 as being innocent. The trial Magistrate committed for trial only the three accused who had been challaned. Later on in view of the evidence adduced by the prosecution during the trial of the said accused, the Sessions Court summoned the two accused who had not been committed by the committing Court. One of the questions that arose in that case was as to whether provisions of Section 319, Cr. P.C. could be resorted to by the Sessions Court to summon the two accused. Point canvassed before their lordship was that any person who was an accused in the case stood excluded from its purview. It was stressed that a person named in the F.I.R. as an accused, even though released by the police under section 169, Cr. P.C. and shown in column No. 2 of the charge-sheet shall have to be considered an accused and thus did not fall within the purview of Section 319, Cr. P.C. Their Lordships repelled the contention with the following observations:—

“As regards the contention that the phrase “any person not being the accused” occurring in Section 319 excludes from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in column No. 2 of the charge-sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) clearly shows that even persons who have been dropped by the police during investigation, but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression”.

(1) A.I.R. 1979 S.C. 339.

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(6) Mr. Ujagar Singh, counsel for the petitioner, sought to distinguish *Joginder Singh's case* (supra) on the ground that in that case no judicial order had been passed by the trial Magistrate as there was only an administrative order under section 169, Cr. P.C. and not an order under section 239, Cr. P.C. Learned counsel canvassed that an order under section 239, Cr. P.C. unless set aside would bar the prosecution attempt to resummon the petitioner as an accused. He cited *Binod Behari Behera v. Niranjan Sahu* (2), for the proposition that a discharge order under section 239, Cr. P.C. is final judicial order and not a provisional or interlocutory order and the Magistrate is barred from reviewing it under section 362, Cr. P.C.

(7) Relevant portion of Section 319, Cr. P.C. is in the terms:—

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.”

The expression ‘not being the accused’ occurring in Section 319, Cr. P. C. immediately gives rise to two queries (i) ‘not being the accused’ before which Court (ii) and at what stage. Section 319, Cr. P. C. authorises a Court to summon a person as an accused if the evidence before it shows that such person had committed any offence for which he could be tried together with the persons who are already being tried as an accused. That means till such time evidence of the kind is before the Court the question of summoning a person not being the accused does not arise, so, it would be at the stage when the evidence is being adduced before the Court that it would consider that the person implicated by the evidence is being tried as an accused before it or not. If such a person is not being tried as an accused, then that person can be summoned to be so tried even though that very Court earlier had discharged him under section 239, Cr. P.C. on the basis of the material placed before the Court in the form of report under section 173, Cr. P.C.

(8) Perusal of the observations of their Lordships in *Joginder Singh's case* (supra) would reveal that their Lordships have emphasised the fact as to whether at the stage when the accused is being summoned by the Court was he being tried as an accused before it or not. According to their Lordships anybody who was not being tried as an accused before the Court is a person who is not an accused before the Court and thus could be summoned as an accused on the basis of the evidence implicating him in the crime.

(9) Mr. Ujagar Singh, counsel for the petitioner, then argued that the order of the Sessions Judge, Ropar, deserves to be quashed on the ground that there was no complete statement of the only witness examined by the prosecution when the application for summoning the petitioner was made before the Trial Magistrate and that incomplete statement cannot amount to evidence in terms of Section 319, Cr. P.C. and in support of his submission he placed reliance on a single Bench decision of this Court rendered in (*Gamdoor Singh v. State of Punjab*) (3) on and drew pointed attention to the following observations of Tiwana, J.:—

“However, it has to appear from the evidence before the Magistrate that any person not being the accused has committed any offence for which he could be tried together with the other accused. This argument of the learned counsel for the petitioner must prevail that unless, the statement of Subhash Chander had concluded it could not be termed “evidence”. The word “evidence” appears to have been used in section 319 of the Code as meaning admissible evidence. The statement of Subhash Chander in the examination-in-chief alone cannot be said to be such “evidence” upon which the Magistrate could act.”

(10) Before noticing the facts of that case, the facts of the present case as mentioned in the petition may be noticed.

(11) It was immediately after the statement of Santosh Kumari in examination-in-chief was recorded and before she could be cross-examined the prosecution filed the present application for summoning the accused.

(12) In the case before Tiwana, J. position was also identical. There also the Magistrate had recorded the examination-in-chief

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(3) Cr. M 5484 M of 1980 decided on 17th December, 1980.

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of one Subhash Chander P.W. and then on that incomplete statement summoned the person as accused in that case. The summoned person challenged that order in Cr. M. No. 5484 of 1980 in this Court and the same was allowed. I entirely concur in the view that Tiwana, J. has taken.

(13) In the result, the direction of the learned Sessions Judge, Ropar in the order that the trial Magistrate is competent to summon the petitioner herein as accused despite the earlier discharge order under section 239, Cr. P.C. is sustained. So, the question posed at the very outset is answered in the affirmative. However, the further direction to allow the application of the prosecution is quashed and the impugned order is modified to that extent with the result that the trial Magistrate shall complete the statement of Santosh Kumari by giving opportunity to the accused already standing trial to cross-examine her. However, it may be observed that in case the accused already standing trial declines to cross-examine the said witness then her statement in examination-in-chief itself would constitute a complete statement and the same shall be considered evidence in terms of Section 319, Criminal Procedure Code. Thereafter, the trial Magistrate shall consider the application of the prosecution for summoning the petitioner as accused on the basis of the completed statement of Santosh Kumari. The petition stands disposed of accordingly.

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N. K. S.