Before M. M. Punchhi, J.

GURTEJ SINGH,—*Petitioner.*

versus

JAGRUP SINGH and another,—*Respondents.*

Criminal Revision No. 1064 *of* 1982.

November 18, 1982

Code of Criminal Procedure (II of 1974)—*Sections* 161, 230, 231 *and* 319—*Accused committed to the Court of Sessions—Recording of prosecution evidence just commenced—Application by the complainant under section* 319 *for summoning those mentioned in column No.* 2 *of the police report—Sessions Judge rejecting the application by reference to material collected during investigation—Such reference—Whether a valid consideration for deciding the application—Word 'evidence' as used in section* 319—*Meaning of.*

Held, that section 319 of the Code of Criminal Procedure 1973 is studded in Chapter XXIV, providing general provisions as to inquiries and trials. It would be logical to say that section 319 of the Code is not only supplemental but an additive to sections 230 and 231 of the Code. Now, in the context when charge is framed against an accused person by the court and occasion arises to try him, the Judge under section 230 of the Code is required to fix a date for the examination of witnesses. Such examination of witnesses in legal parlance, means production of prosecution evidence. All such evidence which the prosecution produces in support of its case is termed as "evidence for the prosecution" under section 231 of the Code and it is that evidence which carries impact on the mind of the Judge for the purposes of section 319 of the Code. For, it is at that stage that something appears to the Court from the evidence that another person, not being the accused facing trial before it, has committed an offence for which such person could be tried together with the accused facing trial before it. It is then that the Court can proceed against such person for the offence which he appears to have committed. Such intention of the framers of the Code, to arm and facilitate the Court in the interest of justice, is crystal-clear from the plain language employed in section 319(1) of the Code. Sustenance can also be sought from subsection (4) of the said section, for it is clearly provided therein that, in case the Court proceeds to join another person as an accused, then the proceedings in respect of such person are required to recommence afresh and the witnesses re-heard for a just trial for him. Not only that, it has further been provided that it is to be treated somewhat fictional, as if the accused person, when called on the employment of the aforesaid provision of law, was fictionally before the Court at the time when it took cognizance of the

offence. These beneficial provisions are meant to pursue the larger interest of the State that persons likely to be held guilty do not escape the clutches of law. It is to promote this functional basis that section 319 of the Code has an adhesive attribute to sections 230 and 231 of the Code, which revolves on the axis of evidence led by the prosecution. Negatively put, the court at this stage has to look to the evidence of the prosecution led before it and singularly no other material; for were it otherwise, then the Court's mind could be clouded by the investigation, the police reports, the statements of witnesses under section 161 of the Code and the order of the committing Court. If the Court has solely to remain influenced by these factors, this would, be dereliction and abandonment of judicial duty in favour of the function of investigators and the formal function of the committing Court; whose functions are not to be Judges in the matter but merely facilitators. It is the Court to sit in judgment over the offence committed and hold who is guilty. Thus, for the trial judge, deciding an application under section 319, to base his conclusions on the investigation, the police reports, the statements of witnesses under section 161 of the Code and the order of the committing court is obviously faulty making it incumbent on the High Court to set the error correct. (Paras 5 & 6).

Petition under Section 401 *Cr. P. C. for revision of the order of the Court of Shri Gurdial Singh, Additional Sessions Judge, Bhatinda, dated the* 31*st May,* 1982 *dismissing the application of the complainant.*

T. S. Sangha, Advocate, *for the Petitioner.*

Radha Krishan Battas, Advocate.

Manmohan Singh, Advocate, *for A.G. Punjab.*

JUDGMENT

Madan Mohan Punchhi, J.—(Oral)

(1) This petition for revision raises rather an interesting question of law. It is, whether a criminal Court (in the instant case that of the Additional Session Judge) in exercise of powers under section 319 of the Code of Criminal Procedure (hereinafter called as the Code) is entitled to take into consideration the material collected during investigaion, and record a finding on the basis thereof not to proceed against a person, not facing trial before it, for an offence which he appears to have committed? The question has arisen in the manner mentioned hereafter.

(2) One Karnail Singh was subjected to a murderous assault in the Court premises at Bhatinda at 2 p.m. on 11th December, 1981. His son Gurtej Singh lodged First Information Report at the concerned police station. According to the version given in the First Information Report, there were four assailants. They were Nachhatar Singh, armed with a *Kirpan;* Atma Singh, son of Nihal Singh, armed with a pistol; Jagrup Singh, armed with a Kirpan; and Atma Singh, son of Gajjan Singh, armed with a Kirpan. Nachhatar Singh accused was said to have been nabbed immediately after the occurrence. The police investigated the crime and submitted their police report in the Court of the Chief Judicial Magistrate, Bhatinda, focussing their attention against two accused, i.e., Nachhatar Singh and Atma Singh, son of Nihal Singh as the culprits of the crime. According to the said report, Jagrup Singh and Atma Singh, son of Gajjan Singh had not participated in the crime and, thus, they were formally shown in column No. 2. The learned Magistrate, in exercise of his functions under section 209 of the Code, committed Nachhatar Singh and Atma Singh, son of Nihal Singh, accused persons, to stand their trial in the Court of Sessions Judge for offence under sections 307 and 307/34, Indian Penal Code. Shri Gurdial Singh, Additional Sessions Judge, Bhatinda, to whom the trial was assigned, framed charge against these two persons and proceeded with the trial. The moment he had examined Karnail Singh, the victim, as a prosecution witness, and before cross-examination was conducted on him by the accused, an application was moved by the complainant for summoning the left out two culprits, namely, Jagrup Singh and Atma Singh, son of Gajjan Singh, as accused, invoking powers under section 319 of the Code. The learned trial Judge,—*vide* his elaborate order, dated 31st May, 1982, rejected the prayer. And this has given rise to the present revision petition.

(3) As will be plain from the reading of the impugned order, the learned Judge rejected the prayer of the complainant, being influenced by three factors: (i) The incident took place in the broad daylight in Court compound. The natural witnesses to the crime, being lawyers and clerks, had joined the investigation. Their statements recorded by the police (some of whom have been named by him in the impugned order) disclose that there were only two culprits; (ii) Undisputably, there was acute enmity between the complainant party and the accused party (presumably he meant the

accused sought to be summoned); and (iii) The suspicion against the police for their having deliberately left out the two persons sought to be summoned as accused, was misfounded as police officers functioned within the bounds of discipline and administrative control.

(4) Now, whether these factors are relevant for the Court exercising powers under section 319 of the Code, is one question to be determined in the instant petition and the other what does the word 'evidence' mean in section 319 of the Code. It would be appropriate to take note of that section herein:—

> "319. (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.
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> (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.
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> (3) Any person attending the Court, although not under arrest or upon a summons, may be detailed by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
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> (4) Where the Court proceeds against any person under sub-section (1), then—
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> (a) the proceedings in respect of such person shall be commenced afresh, and the witnesss re-heard;
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> (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."

In the context, it would be useful to take note of sections 230 and 231, of the Code as well, which stand studded in Chapter XVIII providing for trial before a Court of Session. These are reproduced below :—

> "230.—If the accused refuses to plead, or claimed to be tried or is not convicted under section 229, the Judge shall

fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.

231.—(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

(5) Section 319 of the Code is studded in Chapter XXIV, providing general provisions as to inquiries and trials. It would be logical to say that section 319 of the Code is not only supplemental but an additive to sections 230 and 231 of the Code. Now, in the context when charge is framed against an accused person by the Court and occasion arises to try him, the Judge under section 230 of the Code is required to fix a date for the examination of witnesses. Such examination of witnesses, in legal perlance, means production of prosecution evidence. All such evidence which the prosecution produces in support of its case is termed as "evidence for the prosecution" under section 231 of the Code. And it is that evidence which carries impact on the mind of the Judge for the purposes of section 319 of the Code, or, it is at that stage that something appears to the Court from the evidence that another person, not being the accused facing trial before it, has committed an offence for which such person could be tried together with the accused facing trial before it. It is then that the Court can proceed against such person for the offence which he appears to have committed. Such intention of the framers of the Code, to arm and facilitate the Court in the interest of justice, is crystal-clear from the plain language employed in section 319(1) of the Code. Sustenance can also be sought from sub-section (4) of the said section, for it is clearly provided therein that, in case the Court proceeds to join another person as an accused, then the proceedings in respect of such person are required to recommence afresh and the witnesses re-heard for a just trial for him. Not only that, it has further been provided that it is to be treated somewhat fictional, as if the accused person, when called on the employment of the

aforesaid provision of law, was fictionally before the Court at the time when it took cognizance of the offence. These beneficial provisions are meant to pursue the larger interest of the State that persons likely to be held guilty, do not escape the clutches of law. In judicial annals, the maxim is well enshrined, i.e., "*judex demnatur cum nocens absolvitur*" meaning thereby "that the Judge is condemned when the guilty is acquitted". It is to promote this functional basis that section 319 of the Code has an adhesive attribute to sections 230 and 231 of the Code, which revolves on the axis of evidence led by the prosecution. Negatively put, the Court at this stage has to look to the evidence of the prosecution led before it and singularly no other material; for were it otherwise, then the Court's mind would be clouded by the investigation, the police reports, the statements of witnesses under section 161 of the Code and the order of the committing Court. If the Court has solely to remain influenced by these factors, this would, to my mind, be dereliction and abandonment of judicial duty in favour of the function of investigators and the formal function of the committing Court; whose functions are not to be judges in the matter but merely facilitators. It is the Court to sit in judgment over the offence committed and hold who is guilty.

(6) Now applying the principle, above analysed, to the instant case, the reasons advanced by the learned trial Judge, to base his conclusion on the afore-summarised three factors are obviously faulty, making it incumbent on this Court to set the error correct. The statements under section 161 of the Code, recorded by the police, can be put to a limited use only, as conceived of for purposes under sections 145 and 157 of the Evidence Act. The other limited purpose for which these can be used is for finding a *prima facie* case at the pre-charge stage. These are, strictly speaking, not evidence and, in the context of section 319 of the Code, are not "the evidence" on which the Court has to formulate its opinion. The first factor thus must be out of the way as redundant. Additionally, the persons whose statements were recorded under section 161 of the Code may or may not be examined by the prosecution and may not come to be available to the Court recording findings and judgment. And at the stage of section 319 of the Code, the Court is neither recording a finding nor entering upon a judgment. The participation of a person as an accused in the crime must appear to the Court from the evidence. Such appearance is again *prima*

facie; in other words, subject to the acceptance of evidence, it must lead to the conclusion of guilt. Accepting or rejecting evidence would normally arise at the conclusion of the prosecution case whereupon the Court may, at that stage, put questions to the accused generally about the prosecution evidence, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. It is then that caution is to be exercised by the Court with regard to the factor of acute enmity between the parties. For, enmity is a double-edged weapon, it can be the cause of commission of crime as also the cause for false involvment. Neither of the considerations can surface at the stage of section 319 of the Code. Thus, it has to be held that the second factor too is ruled out. Lastly, the third factor too has to be ruled out for traces of opinion already recorded heretofore. It is the duty of the police officer, investigating the cases; to collect evidence and formulate it in a police-report, as conceived of in section 173 of the Code. One of the important particulars to be mentioned therein, as conceived of in section 173(2)(d) of the Code, is whether any offence appears to have been committed and, if so, by whom. The kind describes itself whether the report is one of discharge under section 169 of the Code or whether there is a case to be tried by the Court and sent to it under section 170 of the Code. All these matters are geared up into one direction which is requiring the Court to come to its own assessment; at one time, at the pre-charge stage; and the other, at the conclusion of the trial. No premium can be put to the investigation on the assumption that it had been done by responsible police officers. It is to be taken that what the Investigating Officer did was right, then perhaps nothing remains to be functioned by the Court. Thus, all the three reasons advanced by the Court, in dismissing the application of the complainant, were irrelevant factors and deserve to be discarded. The learned trial Judge should have applied his mind on the evidence recorded. If he found that the evidence was deficient, he could have either rejected the application at that stage or deferred it to be taken into consideration at any subsequent stage. Whether the evidence was sufficient or not, from which it could appear that the left out two accused had participated in the occurrence or not, that was, and is, in the discretion of the Court. From the impugned order, it is plain, that the learned trial Judge did not engage his attention to the evidence. Thus leaving it open to him to consider the application of the complainant, right at this stage or at any

subsequent stage, which he may deem fit or proper, accepting the revision petition and quashing the impugned order, direct him to proceed in accordance with the observations made heretofore. This petition is allowed accordingly.

N. K. S.

Before S. S. Kang, J.

SARDARI LAL & CO.,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 3621-M of 1982.

November 29, 1982.

Prevention of Food Adulteration Act (XXXVII of 1964)—Section 16(1)(a)—Prevention of Food Adulteration Rules, 1955—Appendix B Item No. A. 05.21—Garam Massala—Whether falls within the definition of 'curry powder' given in Item A. 05.21 in Appendix B—Standard of purity for Garam Masala not prescribed—Seller of such Garam Masala—Whether could be prosecuted under section 16(1)(a).

Held, that 'curry powder' has been defined in item No. A. 05.21 in Appendix B of the Prevention of Food Adulteration Rules, 1955. It is apparent from the definition of curry powder that among other things it contains garlic, ginger, turmeric. These articles are not used in the preparation of Garam Masala. Similarly, curry powder may contain starch and edible common salt, but these are not the ingredients of Garam Masala. No body in this part of the country will purchase Garam Masala to which starch or common salt are added because starch is not added to all meat and vegetable preparations, for the preparation of which Garam Masala may be used. The entry has specifically and unambiguously defined curry powder. The rule making authority has not mentioned Garam Masala to be curry powder. No standard of purity has been prescribed for Garam Masala by the Act or the Rules. As such it is clear that Garam Masala is not a variety of curry powder and no standard of purity having been prescribed by the Rules, no prosecution is possible under section 16(1)(a) of the Prevention of Food Adulteration Act.

(Para 8).

Kailash Chand *vs.* State, 1975 (1) F.A.C. 466.

—*DISSENTED FROM:*