

A LABHUJI AMRATJI THAKOR & ORS.

v.

THE STATE OF GUJARAT & ANR.

(Criminal Appeal No. 1349 of 2018)

B NOVEMBER 13, 2018

[A. K. SIKRI, ASHOK BHUSHAN AND AJAY RASTOGI, JJ.]

*Code of Criminal Procedure, 1973:*

C *s. 319 – Power under – Scope of – Application under s. 319, alleging complicity of the appellants in a case trying offences u/ss. 363 and 366 IPC and u/ss. 3 and 4 of Protection of Children from Sexual Offences Act, 2012 – Application was rejected – In Revision High Court allowed the application – On appeal, held: Power u/s. 319 is discretionary and extraordinary, which should be exercised sparingly – The test to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to the extent that the evidence if rebutted would lead to conviction – High Court has not adverted to the above test nor has given any cogent reason for exercise of power u/s. 319 – From the evidence of the witnesses, complicity of the appellants in the offence*  
D *is not made out – Application u/s. 319 was rightly rejected by trial court.*  
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**Allowing the appeal, the Court**

**HELD: Under Section 319 Cr.P.C. Court can proceed against any person, who is not an accused in a case before it. The person against whom the Court decides to proceed, “has to be a person whose complicity may be indicated and connected with the commission of the offence”. Power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. [Paras 7 and 9][826-D-E; 827-D]**  
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**2. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother, even makes out a *prima facie* case of offence against the appellants. The mere fact that Court has power under**  
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Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 Cr.P.C. The Court has to consider substance of the evidence, which has come before it and has to apply the test, i.e., “more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction.” The High Court has not adverted to the above test nor has given any cogent reasons for exercise of power under Section 319 Cr.P.C. The statement of mother of the victim (PW3) was an hearsay statement and could not have been relied for proceeding against the appellants. PW4, in her statement does not even allege complicity of the appellants in the offence. The mere fact that the jeep, in which she was taken, the appellants were also present, cannot be treated to be any allegation of complicity of the appellants in the offence. The observations of the trial court while rejecting the application holding that the application appears to be filed with *mala fide* intention, has not even been adverted by the High Court. The High Court committed error in setting aside the order of the trial court rejecting the application under Section 319 Cr.P.C. [Paras 12 and 13][828-G-H; 829-A-F]

3. In the present case, there are not even suggestion of any act done by appellants amounting to an offence referred to in Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. Thus, there was no occasion to proceed against the appellants under the 2012 Act. [Para 10][828-D]

*Hardeep Singh v. State of Punjab & Others* (2014) 3 SCC 92 : [2014] 2 SCR 1 – referred to.

#### Case Law Reference

[2014] 2 SCR 1 referred to Para 3  
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1349 of 2018.

From the Judgment and Order dated 30.04.2018 of the High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 277 of 2017.

A D. N. Ray, Dillip Kumar Nayak, Ms. Disha Ray, Mrs. Sumita Ray, Advs. for the Appellants.

Ms. Hemantika Wahi, Ms. Jesal Wahi, Ms. Puja Singh, Ms. Vishakha Advs. for the Respondents.

B The Judgment of the Court was delivered by

C **ASHOK BHUSHAN, J.** 1. This appeal has been filed by the appellants challenging the judgment dated 30.04.2018 of High Court of Gujarat by which judgment Criminal Revision Application filed by complainant-respondent No.2 has been allowed by setting aside the order dated 01.12.2016 of Additional District & Sessions Judge, who had rejected the application filed by the prosecution for proceeding against the appellants in Special POCSO Case No. 10/2016.

2. The brief facts of the case as emerged from the material on record are as follows:-

D 2.1 The complainant-respondent No.2 lodged a First Information Report on 27.05.2015 under Sections 363 and 366 of Indian Penal Code (hereinafter referred to as “I.P.C.”) and under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO ACT”) that her daughter Parvati aged 14 years has been abducted by one Natuji Bachuji Thakor between the night of 26.05.2015 and morning hour of 27.05.2015. It was further alleged that Natuji Bachuji Thakor used to visit my daughter and has given a mobile phone to her, after coming to know of which fact, complainant had warned Natuji. After receiving the First Information Report, Police conducted investigation and submitted a Charge Sheet under Sections 363 and 366 of I.P.C. and Sections 3 and 4 of POCSO ACT against Natuji Bachuji Thakor, the accused. The statement of victim was also recorded by the Police, who, in her statement, had taken the name of Natuji alone. Special POCSO Case No. 10/2016 was registered and trial proceeded against the accused.

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G The statement of PW3 Kanchanben, the mother of victim was recorded. The statement of victim was also recorded as PW4.

2.2 An application under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”) was filed by the Additional Public Prosecutor, where it was stated that in

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the statement of victim, Pw4, she has taken name of Labhuji, A  
Shashikant and Jituji also, who had taken the victim to Morbi in  
the jeep. Prayer was made to proceed against the appellants also  
by initiating appropriate legal proceedings. The application was  
opposed by the appellants. It was stated in the objection that in  
the statement, which was recorded by Police on 03.07.2015, i.e. B  
immediately after the alleged incident, she nowhere in her long  
statement has taken the name of the appellants and it was only in  
the statement, which was recorded in the Court after more than  
one year on 18.06.2016 that she has stated that the appellants, the  
friends of accused were also alongwith accused Natuji.

2.3 The learned POCSO Judge after considering the submissions C  
of the learned counsel for the parties rejected the application.  
The POCSO Judge also observed that prima facie it appears that  
with mala fide intention, the names of the appellants have been  
disclosed. The complainant filed a Criminal Revision against the  
order dated 01.12.2016 rejecting the application, which has been D  
allowed by the High Court by impugned judgment dated  
13.04.2018. Aggrieved with the said judgment, the appellants have  
come up in this appeal.

3. Learned counsel for the appellants submits that High Court  
without there being any valid reason for exercising Jurisdiction under E  
Section 319 Cr.P.C. has reversed the order of POCSO Judge rejecting  
the application under Section 319 Cr.P.C. It is submitted that there was  
no evidence on record on the basis of which it can even be prima facie  
found that appellants had also committed the offence. Learned counsel  
submits that judgment of High Court does not take into consideration the F  
Constitution Bench judgment of this Court in **Hardeep Singh Vs. State  
of Punjab & Others, (2014) 3 SCC 92.**

4. Learned counsel appearing for the respondent refuting the  
submission of counsel for the appellants contends that the name of the  
appellants having been taken both by victim in her statement before the G  
Court as well as in the statement of the mother of the victim, no error  
has been committed by the High Court in reversing the order of POCSO  
Judge and directing the Court below to proceed against the appellants.

5. We have considered the submissions of the learned counsel for  
the parties and have perused the records.

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- A 6. Section 319 Cr.P.C. provides that 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 Court, thus, during the trial on the basis of any evidence
- B is fully empowered to proceed against any person, whose name was not even included in the F.I.R. or the Charge Sheet. The parameters of exercise of power under Section 319 Cr.P.C has been explained by this Court time and again. It is sufficient to refer to Constitution Bench judgment in **Hardeep Singh (supra)**, where this Court had considered
- C the following issue amongst others:-

“6.4. (iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?”

- D 7. The Constitution Bench judgment in the above judgment has held that under Section 319 Cr.P.C. Court can proceed against any person, who is not an accused in a case before it. The Constitution Bench, however, has held that the person against whom the Court decides to proceed, “has to be a person whose complicity may be indicated and
- E connected with the commission of the offence”.

8. Answering the Issue No.(iv) as noticed above, in Paragraph Nos. 105 and 106 of the judgment, following was laid down by the Constitution Bench:-

- F “**105.** Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of
- G committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
- H **106.** Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily

tested on the anvil of cross-examination, it requires much stronger A  
evidence than mere probability of his complicity. The test that has  
to be applied is one which is more than prima facie case as  
exercised at the time of framing of charge, but short of satisfaction  
to an extent that the evidence, if goes un rebutted, would lead to  
conviction. In the absence of such satisfaction, the court should B  
refrain from exercising power under Section 319 CrPC. In Section  
319 CrPC the purpose of providing if “it appears from the evidence  
that any person not being the accused has committed any offence”  
is clear from the words “*for which such person could be tried  
together with the accused*”. The words used are not “for which C  
such person could be convicted”. There is, therefore, no scope  
for the court acting under Section 319 CrPC to form any opinion  
as to the guilt of the accused.”

9. The Constitution Bench has given a caution that power under  
Section 319 Cr.P.C. is a discretionary and extraordinary power, which  
should be exercised sparingly and only in those cases where the D  
circumstances of the case so warrant. The crucial test, which has been  
laid down as noted above is “the test that has to be applied is one which  
is more than prima facie case as exercised at the time of framing of  
charge, but short of satisfaction to an extent that the evidence, if goes  
un rebutted, would lead to conviction.” The present is a case, where the E  
trial court had rejected the application filed by the prosecution under  
Section 319 Cr.P.C. Further, in the present case, the complainant in the  
F.I.R. has not taken the names of the appellants and after investigation  
in which the statement of victim was also recorded, the names of the  
appellants did not figure. After carrying investigation, the Charge Sheet  
was submitted in which the appellants names were also not mentioned F  
as accused. In the statement recorded before the Police, the victim has  
named only Natuji with whom she admitted having physical relations  
and who took her and with whom she went out of the house in the night  
and lived with him on several places. The mother of victim in her  
statement before the Court herself has stated that victim girl returned to  
the house after one and a half months. In the statement, before the G  
Court, victim has narrated the entire sequence of events. She has stated  
in her statement that accused Natuji used to visit her Uncle’s house  
Vishnuji, where she met Natuji. She, however, stated that it was Natuji,  
who had given her mobile phone. Her parents came to know about she

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- A having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji. After one month, Natuji gave another mobile phone to the victim, who had taken it. She stated that in the night at 12 'o' clock, Natuji alongwith his three friends had taken her to Morbi in a jeep. She further stated that she and Natuji stayed for three days at the said place and Natuji had intercourse with her at the said place.
- B When Natuji came to know about lodging of complaint, he took her to Modasa in the jeep. The jeep was given by Labhuji and other two appellants were also in the jeep. She further stated that Labhuji, Shashikant and Jituji came in the jeep and took her and Natuji to the Police Station, where the police interrogated her and she recorded her statement. Natuji
- C was charged with Sections 363 and 366 I.P.C. and Sections 3 and 4 of the POCSO Act.

10. In the present case, there are not even suggestion of any act done by appellants amounting to an offence referred to in Sections 3 and 4 of the POCSO Act. Thus, there was no occasion to proceed against
- D the appellants under POCSO Act.

11. Now, we come back to the reasons given by the High Court in allowing the Criminal Revision and setting aside the order of the POCSO Judge. The judgment of the High Court runs into four paragraphs and the only reason given by the High Court for allowing the revision is
- E contained in paragraph No.3, which is to the following effect:-

- “3. On going through the depositions of the victim as well as her mother, some overtact and participation on the part of the respondent nos. 3 to 5 are clearly revealing. But, this Court is not inclined to opine either way as the said fact was not stated before
- F the police at the time of recording of their statements. But, taking into consideration the provision of Section 319 of the Criminal Procedure Code, this Court deems it appropriate to summon them and put them to trial.....”

12. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that Court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process

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under Section 319 Cr.P.C. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in **Hardeep Singh (supra)** has to apply the test, i.e., “more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction.” Although, the High Court has not adverted to test laid down by the Constitution Bench nor has given any cogent reasons for exercise of power under Section 319 Cr.P.C., but for our satisfaction, we have looked into the evidence, which has come on record before the trial court as statements of PW3 and PW4. PW3 is mother of the victim, who has clearly stated that her daughter has informed that she was abducted by appellants and Natuji, who had taken her to the Morbi in the vehicle of Labhuji. The statement of mother of the victim was an hearsay statement and could not have been relied for proceeding against the appellants. Now, coming to the statement of victim, PW4, she has only stated that Natuji, the accused had come along with his three friends, i.e. appellants and she was taken in the jeep to Morbi. She does not even allege complicity of the appellants in the offence. Her further statement was that she was taken to Morbi in the jeep driven by Labhuji and subsequently was taken to Modasa from Morbi in the jeep of Labhuji which also could not furnish any basis to proceed against the appellants. The mere fact that the jeep, in which she was taken to Modasa, the appellants were also present cannot be treated to be any allegation of complicity of the appellants in the offence. The observations of the trial court while rejecting the application holding that the application appears to be filed with mala fide intention, has not even been adverted by the High Court.

13. We are, thus, of the considered opinion that High Court committed error in setting aside the order of the trial court rejecting the application under Section 319 Cr.P.C. The High Court has not given sufficient reasons for allowing the application under Section 319 Cr.P.C. filed by prosecution. The impugned judgment of the High Court is unsustainable and is hereby set aside. The appeal is allowed.