In the Supreme Court of India

In the matter of reference in

Sukhpal Singh Khaira v The State of Punjab

Short Notes submitted by S. Nagamuthu, Senior Advocate – Amicus Curiae

The judgment in **Hardeep Singh's** case is so comprehensive covering all aspects of Section 319 of Cr.P.C. and none have raised any doubt about the correctness of the propositions laid down therein.

The reference in the instant case does not touch upon any of the propositions laid down in **Hardeep Singh's** case. It is the contention that three aspects have not been covered and therefore, on these three aspects alone, authoritative pronouncement in required, it is contended.

The referred issues are as follows:

1. Whether the Trial Court has the power u/s 319 of Cr.P.C. for summoning additional accused when the trial with respect to other co-accused has ended, and the judgment of conviction has been rendered on the same date **before pronouncing the summoning order?**
2. Whether the Trial Court has the power u/s 319 of Cr.P.C. for summoning additional accused when the trial, in respect of certain other absconding accused (whose presence in subsequently secured), is ongoing/pending having been bifurcated from the main trial?
3. What are the guidelines that the competent Court must follow while exercising power u/s 319 of Cr.P.C.?

Question No. 1:

This question relates to the power of the Trial Court to exercise power u/s 319 of Cr.P.C. after pronouncing judgment of conviction against the existing accused. In Hardeep Singh, it has been categorically held that the power u/s 319 is available from the time of taking cognizance till the pronouncement of judgment.

From the time of taking cognizance until framing of charges, what is done is inquiry and on farming of charges, the trial commences which ends up with the pronouncement of judgment. Both, during inquiry and trial, the Court can exercise the power u/s 319 of Cr.P.C. In other words, before taking cognizance u/s 190 of Cr.P.C. and after pronouncement of judgment on the completion of trial, the Court has no power u/s 319 of Cr.P.C. In view of this settled position of law, after **Hardeep Singh**, the Question No. 1 needs to be answered in the negative.

One more question is raised during arguments that the said power u/s 319 of Cr.P.C. is not available after the termination of trial and before the judgment is pronounced. Section 353 of Cr.P.C. is relied on. Here, termination should be understood to mean, putting an end to the whole proceedings.

In a Sessions Trial, u/s 232 of Cr.P.C., the accused can be acquitted by an order of acquittal. If there is some evidence against the accused, there is a requirement of judgment of conviction or acquittal as the case maybe u/s 235 of Cr.P.C. Either u/s 232 or 235, if the accused is acquitted by passing an order or pronouncing a judgment, the proceedings gets terminated. If the accused is convicted u/s 235(1), the proceedings still continues because the accused is to be heard on sentence. He is entitled to lead evidence at that stage. Therefore, when the accused is convicted, the trial is terminated after sentence is passed. Section 353 of Cr.P.C should be understood in this background and so, it cannot be argued that after the arguments are heard, the Trial gets terminated.

Question No. 2:

As per Section 319 of Cr.P.C., the evidence recorded in the particular case should be the basis to pass an order arraying additional accused. Here, evidence means both oral and documentary evidence which have been brought on record during inquiry or trial. In other words, the evidences collected during investigation such as FIR, Section 161 Cr.P.C. statements, confession of the accused u/s 164 of Cr.P.C., etc. cannot be treated as evidence for the purpose of Section 319 of Cr.P.C. This is so authoritatively held in **Hardeep Singh's** case.

Applying this, if one looks at Question No. 2, it will emerge that the evidence recorded in a separate trial held against the other accused cannot be considered as evidence in the present case. In the instant case, the evidence already on record alone can be considered.

In the split-up case where there is a separate trial, and during the course of that trial, if any evidence comes on record against a person who is not already an accused, based on that evidence alone, in that case, he can be arrayed as an accused u/s 319 of Cr.P.C While doing so, the evidence recorded in the first case cannot be considered at all.

Now, Question No. 2 is not clear as to whether it refers to the 1st Trial Court where the original trial was pending or the 2nd Trial Court where the split-up case was pending. If the trial in the 1st case is terminated, the 1st Court becomes *functus officio* to invoke Section 319 of Cr.P.C. But, until the trial of the 2nd case gets terminated, the 2nd Court can invoke Section 319 on the basis of the evidence recorded only in the 2nd case. This may be the answer to Question No. 2.

Question No. 3:

In **Hardeep Singh's** case, sufficient guidelines for the Courts to follow while exercising the power u/s 319 of Cr.P.C. have been given except on certain aspects. These gaps may be filled up issuing guidelines by this Hon'ble Constitution Bench.

i). When a person is summoned as an additional accused, whether he should be tried jointly with the existing accused and if so, what will happen to the voluminous evidence already recorded?

Section 319 of Cr.P.C., in explicit terms, does not prescribe that there has to be a joint trial. U/s 223 of Cr.P.C., certain people may be charged and tried together. So it is the discretion of the Court whether to charge and try two or more persons together in the same trial. The accused has no right to demand for joint trial. In **Shashikant Singh v Tarkeshwar Singh (2002 5 SCC 738),** a Two Judge Bench has categorically held that it is the discretion of the Court either to have joint trial or to have a separate trial. This judgment has been followed in at least ten cases namely:

Name of the Case	**Citation**	**Para**	**Bench Strength**
Prasanna Dass and Ors. vs. State of Orissa	(2004) 13 SCC 30	Para 6	2 judges
Guriya vs State of Bihar	(2007) 8 SCC 224; AIR 2008 SC 95	Para 8	2 judges
Rajendra Singh vs. State of U.P.	(2007) 7 SCC 378; AIR 2007 SC 2786,	Para 11	2 judges
Nishan Singh vs Punjab	(2008) 17 SCC 505; AIR 2008 SC 1661	Para 20	2 judges
Bholu Ram vs State of Punjab	(2008) 9 SCC 140	Para 34	2 judges
Sarabjit Singh vs State of Punjab	(2009) 16 SCC 46; AIR 2009 SC 2792	Para 9	2 judges
Hardeep Singh vs State of Punjab	(2009) 16 SCC 785 AIR 2009 SC 483,	Para 32	2 judges
Harinarayan G. Bajaj vs State of Maharashtra	(2010) 11 SCC 520	Para 20, 21	2 judges

Sarojben Ashwinkumar Shah vs Sarojben Ashwinkumar Shah	(2011) 13 SCC 316	Para 12	2 judges
Babubhai Bhimabhai Bokhiria vs State of Gujarat	(2013) 9 SCC 500; AIR 2013 SC 3648	Para 10	2 judges

and referred to in two cases namely:

Name of the Case	**Citation**	**Para**	**Bench Strength**
Ram Singh and Ors. vs. Ram Niwas	(2009) 14 SCC 25	Para 19	2 judges
Harbhajan Singh and Ors. vs. State of Punjab	(2009) 13 SCC 608	Para 11	2 judges

Therefore, depending upon the circumstances, it is for the Trial Court to decide whether to try the newly added accused along with the existing accused jointly in the same Trial or not.

If there is no joint trial:

If the Trial Court decides not to have a joint trial of the newly added accused along with the existing accused, the consequence is that as per Sub-Section 4 of Section 319 of Cr.P.C., as against the newly added accused, the trial should be a fresh trial. So far as the existing accused is concerned, the trial can further proceed from the stage where it stood before the proceedings u/s 319 of Cr.P.C.

If there is a joint trial:

If the Trial Court decides to have a joint trial, then, fresh trial should be conducted against all the accused including the existing accused. In such an event, the evidence already recorded is no evidence against the added accused in view of Section 273 of Cr.P.C. Section 32 and 33 of the Evidence Act are not applicable. In a case, there cannot be two sets of evidence, one against the existing accused and the one against the added accused. As a consequence, the evidence already recorded is no evidence against any accused including the existing accused. Fresh trial is to be conducted against all the accused and the witnesses are to examined afresh both in chief, cross and re-examination. The evidence already recorded would not be wiped off. But, it can be used only

for the limited purpose of contradiction as provided in Section 145 of the Evidence Act as a previous statement. It cannot be used as a substantive evidence against anyone.

Whether proceedings u/s 319 of Cr.P.C. is independent?

Initiating of proceedings u/s 319 of Cr.P.C. must be in the same trial. In other words, it is part of the same trial proceedings. It is not an independent proceeding. But, in the facts narrated in the referral order, it is revealed that the Trial Court separated the Petitioner u/s 319 of Cr.P.C. from the main trial, treated the same as an independent case and passed an order arraying the accused. If such a petition is treated as an independent proceeding, then the evidence which forms part of the main case cannot be considered. Therefore, as clearly indicated in Section 319 of Cr.P.C., the proceedings u/s 319 should form part of the main case and after an order is passed arraying someone as an accused, and after his appearance, in response to the process, Section 207 or 208 must be complied with and thereafter, the Court has to decide whether he should be charged jointly with the rest of the accused and tried.

Whether the proposed accused is entitled for notice and hearing?

In **Jogendra Yadav v State of Bihar (2015 9 SCC 244),** a Two Judge Bench has held that by the way of adhering to the principles of natural justice, the Court is obliged to issue notice and to hear him before he is arrayed as an accused.