HIGH COURT OF GUJARAT

Bench: Honourable Mrs. Justice M.K. Thakker

Date of Decision: 9th May 2024

Case Number: R/Criminal Appeal (For Quashing of Order/Stay) No. 971 of 2024

Sunilbhai Shantilal Parmar …. Petitioner

Versus

State of Gujarat & Ors. … Respondents

Legislation and Rules:

Section 14A(2) of the Schedule Castes & Schedule Tribes (Amendment) Act, 2015

Section 319 of the Code of Criminal Procedure, 1973

Sections 302, 307, 323, 294b, 506(2), 120b, 34 of the Indian Penal Code, 1860

Section 135 of the Gujarat Police Act

Subject: Appeal against the trial court's order joining the appellant as accused no. 4 in a case involving charges of murder, grievous injury, and other offenses under the IPC and Gujarat Police Act. The appeal challenges the application of Section 319 Cr.P.C. by the trial court based on new evidence presented during the trial.

Headnotes:

Criminal Law - Joinder of Additional Accused - Criminal Law – Appeal under Section 14A(2) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 2015 – High Court’s Dismissal of Appeal Challenging Addition of Accused under Section 319 of Cr.P.C – Court upheld Trial Court’s Order Adding Accused Based on Eyewitness Testimony – Plea of Alibi Considered and Rejected – Appellant’s Presence and Involvement Established through Multiple Witness Statements and CCTV Footage Identification – No Illegality or Perversity Found in Trial Court’s Order – Appeal Dismissed. [Paras 1-15]

Section 319 Cr.P.C – Application and Scope – Supreme Court Guidelines Reiterated – Power to Add Accused should be Exercised Sparingly and with Higher Degree of Satisfaction – Evidence Before Court Must be Strong and Reliable, Leading to Conviction if Unrebutted – Court Emphasized Proper Scrutiny of Evidence before Adding Accused under Section 319. [Paras 7-11]

Plea of Alibi – Burden of Proof – High Threshold Required to Prove Alibi – Evidence must Exclude Possibility of Presence at Crime Scene – Mere Probable Presence Elsewhere Insufficient – Accused's Alibi Unsupported by Corroborative Evidence, thus Rejected by Court. [Paras 4, 6, 9]

Decision – Dismissal of Appeal – Held – Appeal is Dismissed Based on Strong Evidence Against Appellant – Eyewitness Testimony and CCTV Identification Corroborated by Multiple Witness Statements – No Fault in Trial Court's Decision to Add Appellant as Accused – Trial Court's Order Affirmed. [Para 15]

Referred Cases:

- Y. Saraba Reddy v. Puthur Rami Reddy, (2007) 4 SCC 773
- Kamal Prasad & Ors v. State of Madhya Pradesh (Now State of Chhattisgarh), 2023 (10) SCC 172
- Shankar & Ors v. State of Uttar Pradesh & Ors, 2024 (0) AIJEL-SC 73607
- Binay Kumar Singh v. State of Bihar, AIR 1963 SC 1094
- Pyare Lal Bhargava v. State of Rajasthan, AIR 1963 SC 1094
- Ram Singh v. Ram Niwas, (2009) 14 SCC 25
- Hardeep Singh v. State of Punjab, (2014) 3 SCC 92

Representing Advocates:

Vasimraja A. Kureshi for the appellant

Ms. Vrunda Shah, APP for the State

ORAL JUDGMENT

1. The present appeal is filed under section 14A(2) of the Schedule Cast & Schedule Tribe (Amendment) Act, 2015 challenging the order passed below Exh.60 in Special Atrocities Case No.13 of 2021 whereby, the applicant is ordered to be joined as accused no.4 by exercising the power under section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C).

2. It is the case of the prosecution that FIR came to be lodged by Kalpanaben wife of Manojbhai Valjibhai Parmar for the offences punishable under section 302, 307, 323, 294b, 506(2), 120b, 34 of Indian Penal Code, 1860 and section 135 of the Gujarat Police Act on 16.02.2021 around 8:30 in the night alleging three named accused persons and one unnamed person armed with deadly weapons attacked and killed the husband and caused serious injuries to her father-in-law.

2.1. On setting criminal law in motion, the Investigating Officer recorded the statement of 22 witnesses including the eye-witness namely Kalavatiben Jitubhai Vankar, and statement recorded under section 164 of Cr.P.C of complainant Kalpanaben, Kalavatiben and Valjibhai Parmar on 03.03.2021 produced before the learned trial court below Exh.55 wherein also, this witness has stated that applicant came on the spot on his bike and inflicted blows with knife on the throat of the deceased and thereafter, fled on his bike. The description of the clothes put on by Sunil Parmar, the applicant, was also given by the present witness.

2.2. Thereafter, Investigating Officer interrogated the applicant at the police station. However, instead of arraigning him as an accused, he was shown as witness no.33. Likewise the applicant, his mother namely Radhaben was also named by this witness alleging that she was instigating the other accused persons to kill the deceased. However, during the statement recorded under section 164 of Cr.P.C, no allegations were made against the mother namely Radhaben and she was also shown as witness no.39 in the charge-sheet dated 11.04.2021.

2.3. On filing the charge-sheet, the application was moved by the father of the deceased namely Manojbhai Valjibhai Parmar below Exh.9 on 07.09.2021 raising grievance that though name of the applicant and his mother was stated in the statement recorded under section 161 of Cr.PC, as well as daughter who was the eye-witness has identified the applicant from the CCTV

footage of the place of offence, the Police Officer in connivance with the applicant and his mother, has exonerated the present applicant and his mother without filing any report before the Court of law.

2.4. It is further stated in the application that the complainant who is daughter-in-law has left the house after the death of the son and she is not maintaining any relations with the witnesses who are parents and sister of the deceased. It was further contended in the application that statement which was recorded by the applicant i.e the father of the deceased under section 164 of Cr.P.C, name of the applicant though mentioned, the Police Officer did not array the applicant as accused and thereafter, though complaint was made, no actions were taken by the Police Officer. It is submitted that due to old age and the injury which was caused by the accused persons, the movement in his one hand was restricted. It is prayed in the application below Exh.60 to array the applicant and his mother namely Radhaben as accused in the offence. This application was filed on 07.09.2021 i.e immediately after the charge-sheet was submitted. The aforesaid application was permitted to be withdrawn vide order dated 26.01.2022 with a liberty to file afresh at the stage of recording of evidence.

2.5. Thereafter, the evidence of the witness namely Kalavatiben was recorded below Exh.51 on 20.07.2023. During the chief-examination, she narrated the incident by deposing when they were returning from the Makarpura Railway Station in the rickshaw all the accused including the applicant has brutally assaulted the deceased and after assaulting the deceased, applicant fled on his bike. Therefore, again an application was moved by Kalavatiben below Exh.60 praying to exercise the power under section 319 of Cr.P.C and to join the applicant and his mother as accused persons. The aforesaid application was decided after giving opportunity of hearing to the applicant and prosecution and the learned trial court was pleased to disimiss the application qua the mother namely Radhaben and allowing partly the application below Exh.60 directing the applicant to be joined as accused no.4, which is the subject matter of challenge before this Court.

3. Heard the learned advocate Mr.Vasimraja Kureshi for the appellant and learned APP Ms.Vrunda Shah for the State.

4. Learned advocate Mr.Kureshi submits that during the investigation, initially, the applicant was called by the Investigating Officer. However, the applicant has raised his plea of alibi and to verify the plea of alibi, statements

of two witnesses were recorded by the Investigating Officer namely Kanubhai Jamnadas Damnani on 05.03.2021 owner of shop where applicant was working who stated in his statement recorded under section 161 of Cr.P.C that applicant was at his shop on 16.02.2021 from 7:30 a.m. upto 9:00 p.m. The present witness had stated that applicant had informed that the mother called the applicant and asked him not to come at the house because of the quarrel which had taken place and therefore, he was allowed to sleep in the shop during the night. Another statement of witness namely Babubhai Mohammedbhai was recorded, who was rickshaw driver and had accompanied the applicant for delivering the goods at Jalaram caterers on the instructions of Kanubhai Damnani at night around 9:30 pm.

4.1. Learned advocate Mr.Kureshi submits that on satisfying with the above statements, the Investigating Officer did not arraign the applicant as accused, though no additional material is placed on record, the learned trial court did not consider the above evidence and allowed the application directing to join the present applicant as accused no.4.

4.2. Learned advocate Mr.Kureshi further submits that though the earlier application which was preferred by the father was withdrawn, learned trial court has entertained the application without considering the said facts and only on relying upon the evidence of Kalavatiben. Learned advocate Mr.Kureshi further submits that the statement under section 161 of Cr.P.C. of the father who is the injured witness namely Valjibhai Parmar was recorded on 01.03.2021 who had not stated with regard to the complicity of the present applicant. However, learned trial court has not considered the same and allowed the application.

4.3. Learned advocate Mr.Kureshi submits that mere probability of the complicity would not be sufficient to exercise the power under section 319 of Cr.P.C but the test is to apply more than prima facie case against the respondent-accused. However, without applying the aforesaid principle, the learned trial court has exercised the power under section 319 of Cr.P.C and therefore, learned advocate Mr.Kureshi prays to quash the impugned order below Exh.60 and to allow this application.

5. As against the same, learned APP Ms.Vrunda Shah submits that learned trial court, after giving detailed reasons, and after analyzing the material, has passed the order partly allowing the application below Exh.60

and ordered the present applicant to be joined as accused no.4. Therefore, no interference is required.

6. Considering the arguments advanced by the learned advocates for the respective parties and the material placed on record, it transpires that the FIR under section 302 Cr.P.C was lodged being I-CR No. 11196016210218 of 2021 before Makarpura Police Station, Vadodara City by the wife of the deceased naming three persons as accused and one unknown person. It is alleged in the FIR that mother of the applicant used to tease the husband on account of remarrying with the complainant who is having two children from earlier marriage. Prior to the incident, the deceased husband had slapped the mother namely Radhaben and to take revenge of the said incident, the assault was made by the accused persons, who are the sons of the Radhaben.

6.1. It further transpires from the record that initially on statement of the eye-witness the present applicant was interrogated and statement was recorded under section 161 of Cr.P.C. In his statement dated 05.03.2021 he stated that he was on his job on 16.02.2021 from 7:30 am to around 8:45 p.m. It was further stated in his statement that his mother namely Radhaben had informed him that a quarrel had taken place by Ritvik, son-in-law Ganesh, brother namely Sanjay alongwith Manoj Parmar (deceased) and Manoj Parmar was assaulted by Sanjay, Ritvik and Ganesh as well as caused serious injuries to Valjibhai Parmar.

6.2. It was informed to him by the mother Radhaben not to return to the house because of the above quarrel and therefore, he went alongwith one Babubhai Sheikh who is rickshaw driver at Gorva to deliver the goods to Jalaram caterers and returned to the shop at 10:00pm and because of the quarrel, the shop owner permitted him to stay in the shop during night. This witness has further stated that from the date of offence that is 16.02.2021 till the date of statement that is 05.03.2021 he did not return to his house.

6.3. After recording this statement, the Investigating Officer had recorded the statement of shop owner namely Kanubhai Jamnadas who supports the statement of the present applicant and one Babubhai Mohammadbhai Sheikh rickshaw driver on 06.03.2021. The Investigating Officer believed the case of the applicant and his plea of alibi and therefore, present applicant was not charge sheeted and shown as witness in the charge-sheet as witness no.33.

6.4. It is true that previously the application which was preferred was withdrawn but liberty was reserved to move at the stage of recording evidence. The charge was framed on 06.01.2022. Total 6 witnesses were examined. The eye-witness namely Kalavatiben was examined on 20.05.2023 and thereafter, again application was given by Kalavatiben below Exh.60 on 24.08.2023.

7. At this stage, mute question comes for consideration is that whether satisfaction of the Investigating Officer or supervising officer is to be treated determinative? The Hon'ble Apex Court has considered similar question in the case of **Y.Saraba Reddy Vs Puthur Rami Reddy reported in (2007) 4 SCC 773** and held as under:

> 4. The trial Court rejected the application made in terms ofSection 319 of the Code primarily on the ground that the plea of alibi raised by the respondent was investigated by the Deputy Superintendent of Police under the instructions of the Superintendent of Police and on his satisfying about the substance in the plea of accused about their non-involvement. directed the omission of their names. Though their names were deleted from the array of accused their names were found in the FIR and statement of witnesses. Assailing the same, firstly the State filed Crl.R.C.No.1476 of 2004 and thereafter appellant (PW-1 the de facto complainant) filed Crl.R.C. No.1551 of 2004 before the High Court. The High Court found no infirmity in the trial Court's order and additionally found that the charge sheet was filed on 7.11.1997. Neither the public prosecutor nor the appellant took any steps immediately. Only on 7.7.2004 an application was filed. The High Court found that first of all the appellant and the public prosecutor should not have kept quiet for such a long period of about 7 years. The fact that they kept silent for such a long period, according to High Court, shows that the plea of alibi which was found to be true by the Special Investigating Officer who enquired into that aspect was true. The High Court also accepted that there was force in the contention that on account of political factions the respondents were falsely implicated and on account of change of government, the public prosecutor had filed the petition. Since the Deputy Superintendent of Police had found the plea of alibi to be correct, the fact that the witnesses during trial stated otherwise was really of no consequence.
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> 5. In support of the appeal, learned counsel for the appellantsubmitted that the orders of the trial Court as well as that of the High Court cannot be maintained. The alleged occurrence took place on 26.7.1997. The charge

sheet was filed on 7.11.1997 and charges were framed on 25.8.2003. The delay in framing of charges cannot in any way be attributed to the complainant. PW1 was examined on 7.7.2004 and immediately after his evidence was recorded, the application in terms of Section 319 of the Code was filed. There was, therefore, no scope for the High Court to hold that there was delay in making the application. Before the charges were framed there was no scope for any application being filed in terms of Section 319 of the Code.

6. In response, learned counsel for the respondents submitted thatafter a thorough investigation, the Investigating Officer had accepted the plea of alibi. The High Court was justified in rejecting the prayer made by the prosecution and the complainant.

7. We find that the High Court has failed to notice the fact thatthere was in fact no delay in making the application. Though the charge sheet was filed on 7.11.1997, charges were framed on 25.8.2003. The order sheet shows that the delay cannot in any way be attributed to the complainant. There is a basic fallacy in the approach of the High Court. It called for the file to be satisfied as to whether the enquiry conducted was to be preferred to the evidence of PW-1. If the satisfaction of the Investigating Officer or Supervising Officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the Investigating Officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW-1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be given primacy is unsustainable. The High Court was not justified in holding that there was belated approach."

7.1. In view of the aforesaid decision, this Court is of the view that the trial court can take such a step to add such person as accused only on the basis of evidence adduced before it and not on the materials available in the charge-sheet. Therefore, Investigating Officer's satisfaction should not be given primacy.

8. It is contended by the learned advocate Mr.Kureshi that Valjibhai Parmar who is injured witness has not stated his name in the statement recorded on 01.03.2021, he was arraigned accused on the evidence of Kalavatiben who is the sister of the deceased. It transpires from the record that the previous application which was preferred below Exh.9 was by the father himself stating

that though the statement was recorded under section 164 of Cr.P.C. and he disclosed the name of the applicant then also, the applicant was not arraigned as accused by the Investigating Officer. In the above application it was contended the daughter i.e Kalavatiben has identified the applicant present at the time of offence in the CCTV footage. However, though grievance was raised for not charge sheeting the applicant, the Police Officer did not take any action. The charge-sheet was submitted before the learned trial court on 11.04.2021 and immediately thereafter, the father approached the learned trial court by filing the application below Exh.15 on 27.07.2021 which was produced on 07.09.2021 exonerating the applicant from charges without filing any report under section 169 of Cr.P.C. and citing him as witness on the basis of oral evidence of two witness.

9. At this stage, this Court has considered the judgment rendered by the Hon'ble Apex Court in the case of **Kamal Prasad and Ors Vs Sate of Madhya Pradesh (Now State of Chhattisgarh) reported in 2023 (10) SCC 172. T**he relevant paragraphs are reproduced herein below:

23. Another defence taken by the convict-appellants is thatof the plea of alibi. This Court in Binay Kumar Singh v. State of Bihar6 has noted the principle as:

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime."

24. The principles regarding the plea of alibi, as can be appreciated from the various decisions7 of this Court, are:

24.1. It is not part of the General Exceptions under the IPC and isinstead a rule of evidence under Section 11 of the Indian Evidence Act, 1872.

24.2. This plea being taken does not lessen the burden of theprosecution to prove that the accused was present at the scene of the crime and had participated therein.

24.3. Such plea is only to be considered subsequent to theprosecution having discharged, satisfactorily, its burden.

24.4. The burden to establish the plea is on the person takingsuch a plea. The same must be achieved by leading cogent and satisfactory evidence.

24.5. It is required to be proved with certainty so as tocompletely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of 'strict scrutiny' is required when such a plea is taken.

25. We notice that the defendants have laid certain evidenceattempting to indicate their presence being at a place other than the spot of commission of the offence. The statements of four witnesses, namely, Sonchand DW-1; Jageshwar Prasad DW-2; Ramadheen DW-3; and Parsu Das DW-4 form part of record. However, DW-3 testifies to the whereabouts of accused Sandas and DW-4 does so for accused Anand Ram, both of whom the present case does not concern as the appellants before us are Kamal Prasad (A-3), Shersingh (A-6) and Bhavdas (A-9).

26. The two relevant defence witnesses for the convict-appellantsbefore us, are as under:-

26.1. DW-1 states that A-9 is his uncle and had come to hishouse to go to Sandi Bazar. When the police came to arrest him he mentioned to them that he had just been returning from Bhalesur and did not have any relation with the offence. He was arrested by the police.

26.2. DW-2 submitted that on the day of the offence, A-9 went tothe shop run by him at Bhalesur to purchase some tea and jaggery. The distance between Bhalesur and Sundri is 16 Kilometres.

27. In our considered view, both these defence witnesses do notconclusively establish the plea of alibi, based on the principle of preponderance of probability as their statements stand unsupported by any other corroborative evidence. Not only that, no reason stands explained in such testimony for A-9 having travelled from Bhalesur to Sundri in order to go to Sandi Bazar. It is a matter of record that A-9 is a resident of Bhalesur where he resided with his family. He owned farms in Sundri. The family of A-9 was not examined to substantiate the claim of such travel. For those reasons, we cannot believe the version testified to by DW-1 and DW-2. We also cannot ignore that all 3 primary witnesses of the prosecution i.e., PW-3, PW-16, and PW-17 have categorically deposed the presence of the convict-appellants at the spot of the crime and such a statement could not be shaken in cross-examination.

28. We find that for the plea of alibi to be established, somethingother than a mere ocular statement ought to have been present. After all, the prosecution has relied on the statement of eyewitnesses to establish its case

against the convict-appellants leading to the unrefuted conclusion that convict-appellants were present on the spot of the crime and had indeed caused injuries unto the deceased as also PW-3 with Lathis and Tabbal on various and vital parts of their bodies.

9.1. Therefore, this Court is of the view that relying on the ocular evidence that too by Investigating Officer exclude the applicants presence on the spot of crime, particularly when the case is based on statement of eye-witness to establish the case against the applicant, cannot be considered as conclusive proof and therefore, learned trial court justify in allowing the application below Exh.60.

10. As per the law laid down by Hon'ble Apex Court in the case of **Shankar and Ors. Versus State of Uttar Pradesh and Ors. Reported in 2024 (0) AIJEL-SC 73607** it was held that degree of satisfaction required to exercise the power under section 319 is much stricter. The observations made by the Hon'ble Apex Court regarding the same is reproduced here in below:

15. Having taken note of the provision, we will note the principles laid down by a Constitution Bench of this Court in Hardeep Singh v. State of Punjab, (2014) 3 SCC 92, for criminal courts to follow while exercising power under Section 319 Cr.P.C.:

"94. In Pyare Lal Bhargava v. State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word "appear". The Court held that the appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. In Ram Singh v. Ram Niwas, (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear" as appearing in the section. The Court held that for the fulfilment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as the accused in the case.

95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter.

105. Power under Section 319 CrPC is a discretionary and anextraordinary 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 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.

106. Thus, we hold that though only a prima facie case is to beestablished from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger 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 unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC."

16. The degree of satisfaction required to exercise power under Section 319 Cr.P.C. is well settled after the above-referred decision. The evidence before the trial court should be such that if it goes unrebutted, then it should result in the conviction of the person who is sought to be summoned. As is evident from the abovereferred decision, the degree of satisfaction that is required to exercise power under Section 319 Cr.P.C. is much stricter, considering that it is a discretionary and an extra-ordinary power. Only when the evidence is strong and reliable, can the power be exercised. It requires much stronger evidence than mere probability of his complicity.:

11. Keeping in mind the above ratio, now if evidence relied by Kalavatiben in support of her application is to be considered, then it indisputably comes on record that

(i) Mother of applicant Radhaben, deceased had slappedbefore four to five day of incident on the ground of teasing the deceased on account of marriage of the deceased with complainant having two kids from earlier marriage.

(ii) accused and deceased are cousin brothers.

(iii) during post-mortem there were 24 ante morteminjuries found.

(iv) statement recorded under section 164 of Cr.P.C ofeye-witnesses reveals the name of the applicant.

(v) Applicant was interrogated thereafter, shown aswitness without following procedure under law.

(vi) charge-sheet was filed on 11.04.2021 the father filedapplication at Exh.9, which was withdrawn with liberty to move after recording of evidence vide order dated 26.01.2022.

(vii) Thereafter, evidence of Kalavatiben was recorded at Exh.51 and again application filed below Exh.60.

(viii) Kalavatiben identified the presence of applicant inCCTV footage of place of crime.

12. It can be averred that the power under section 319 is an extraordinary power conferred upon the court to do real justice. It should be used with caution and only if compelling reasons exist for proceedings against a person against whom the action has not been taken where the evidence shows that involvement of a person in the commission of a crime the Court should exercise the power under section 319 and to summon him as an additional accused.

13. This Court is of the view that there is a reasonable prospect of the case against the present applicant ending in conviction for the offence concerned and hence, the learned trial court has rightly exercised the power by joining the applicant as accused no. 4.

14. Therefore, in view of the overall circumstances, this Court is of the view that no illegality or perversity is found in the impugned order below Exh.60 of the learned trial court. Hence, this appeal deserves to be dismissed.

15. Resultantly, appeal is dismissed. Order dated 06.02.2024 passed in Special Atrocity Case No. 13 of 2021 below Exh.60 is hereby confirmed.