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POWER OF THE COURT TO ADD PERSONS AS ACCUSED DURING THE COURSE OF 'INQUIRY' OR 'TRIAL'—A STUDY IN THE LIGHT OF SAROJBAN ASHWINKUMAR SHAH & OTHER'S CASE*

—Dr. (Prof.) Mukund Sarda**

1. The power of the Court to add person/persons as accused during the course of 'inquiry' or 'trial' is provided for under Sec 319 of the Code of Criminal Procedure, 1973 which states thus:

- (i) 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.
- (ii) 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.
- (iii) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
- (iv) Where the Court proceeds against any person under Sub-section (1), then—
 - (a) The proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
 - (b) Subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when

* *Sarojban Ashwin Kumar Shah & Ors. v. State of Gujarat & Ors.*, III (2011) BC 543 (SC).

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the Court took cognizance of the offence upon which the inquiry or trial was commenced.

2. It is the duty of the Court to punish real culprits. Power under Section 319 can be exercised at any stage of the proceedings. If the prosecution at any stage produces evidence which satisfies the Court that a person should have been made an accused, then the Court can take cognizance and try him along with other accused persons. The power of the Court to add person/persons as accused can be exercised, even if the proceedings against him, had been quashed¹, name mentioned in the statements made under Section 161 of the Code of Criminal Procedure, 1973, though not charge-sheeted, on an application made by the approver after taking evidence of one eye-witness². The Court can take cognizance against persons named in the 'Dying Declaration'³ by giving wider meaning to 'evidence' to include evidence other than recorded by the Court. The Court can take cognizance in respect of persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court⁴. The power exercisable under Section 319 applies to all Courts⁵.

3. The Supreme Court in *Sarojben Ashwin Kumar Shah's case*⁶ laid down the following guidelines in the matter of exercise of powers under Section 319, Cr.P.C.⁷ by the Courts to add person/persons as accused during the course of 'inquiry' or 'trial':

- (1) The power may be used either '*suo motu*' or on an application of the accused;⁸
- (2) The proceedings against the newly added accused persons shall be commenced '*de novo*'. The whole proceedings must be recommenced from the beginning of the trial, as it virtually affects the rights of a person so brought before the Court⁹. The Court has the undoubted power to summon material witnesses at any stage of inquiry¹⁰;
- (3) The power conferred on the Courts under Section 319 is an 'extraordinary power'¹¹, and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other persons against whom action has not been taken;
- (4) The exercise of power is within the 'discretionary power'³ of the Court concerned, so that it may act according to law;
- (5) The Court must have reasonable satisfaction from the evidence already collected regarding two aspects:

- a
- (i) That the other person has committed the offence; and
 - (ii) For such offence, he could well be tried along with the already arraigned accused;
- b
- (6) A judicial exercise¹² is called for keeping a conspectus of the case on the following aspects:
- (i) The stage at which the trial has proceeded already;
 - (ii) The quantum of evidence collected till then; and
 - (iii) The amount of time which the Court had spent for collecting such evidence.
- c
- (7) There is no compelling duty on the Court to proceed against other persons;
- d
- (8) Unless the Court is hopeful that there is a reasonable prospect of the case as against the newly brought accused ending in being convicted of the offence concerned The Court shall refrain from adopting such a course of action;
- e
- (9) The discretionary power conferred on the Court cannot be exercised to conduct a 'fishing enquiry'¹³;
- f
- (10) Courts cannot add persons as accused on the basis of material evidence available in the charge-sheet or case diary. It must be based on additional evidence let in before the Court;
- (11) A mere doubt about involvement of other/others as the basis of evidence let in before the Court is not enough *i.e.*, the evidence on record must sufficiently establish that the other accused has committed the offence;
- (12) Evidence recorded during the Police Investigation cannot be relied upon¹⁴.

g

4. Though enough safeguard is provided to protect the interest of person so added as an accused that his addition is based on sufficient evidence given in the Court and for a '*de novo*' proceedings, there is a need for a provision to enable the person to be given an opportunity to show cause. That the witnesses had committed 'perjury' which could not be found out when they were cross-examined and the witnesses bore ill-will against him to deliberately implicate him and they were instigated by some outside elements to involve him in the proceedings in order to cause mental agony or torture. It would be a fit case for the Court not to act upon such evidence once considered reliable and sufficient

proceed against him and then it would enable the Court to drop such actions in the interest of Justice.

5. The following proviso may be added to Section 319:

Section 319(5): *Provided further no such order can be passed by the Court to proceed against any such person, unless he is given a reasonable opportunity to show cause as to why, he should not be proceeded against.*

It should be permissible for the Court to allow such person to examine such witnesses on whose evidence the Court has taken the steps to proceed against him as an accused.

References:

1. *Municipal Corporation of Delhi v. Ram Kishen Rohtagi*, AIR 1983 SC 67.
2. *Sri Mahant Amarnath v. State of Haryana*, AIR 1983 SC 288. See also *Mahajan's* case 1988 Cr. LJ 1467.
3. *Dilip Singh v. State of Rajasthan*, (1989) Cr. LJ 600 (Raj).
4. *Palaniswamy Gounder v. State*, represented by the Inspector of Police, (2005) 12 SCC 327.
5. *Joginder Singh & another v. State of Punjab*, (1979) 1 SCC 345.
6. *Supra* 543.
7. Cr.P.C. through the study means 'The Criminal Procedure Code, 1973'.
8. *Mohan Wahi v. State*, 1982 Cr. LJ 2040 See also *Sohan Lal's* case 1990 Cr. LJ 2302.
9. *Shashikant Singh v. Tarakeshwar Singh*, (2002) 5 SCC 738 at 743.
10. *Mahender Kumar v. State of Madhya Pradesh*, (1987) Cr. LJ 1450.
11. *Krishnappa v. State of Karnataka*, (2004) 7 SCC 792.
12. *Micheal Machado & Another v. CBI and Another*, (2000) 3 SCC 262.
13. *Guriya & Others v. State of Bihar*, (2007) 8 SCC 224.
14. *Pukhraj v. State of Rajasthan*, (1989) Cr. LJ 2551.