

131 IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-5128-2024
Date of decision: 31st January, 2024

Baljinder Singh

...Petitioner(s)

Versus

State of Punjab

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Ms. Riffi Birla, Advocate for the petitioner.
Ms. Ruchika Sabherwal, DAG, Punjab.

MANISHA BATRA, J (ORAL):-

The petitioner is seeking setting aside of order dated 19.01.2024 passed by learned Additional Sessions Judge, Fast Track/Special Court, Fazilka bearing case No. 125/2020 titled as ‘State vs. Baljinder Singh’ whereby an application filed by him for recalling of the certain witnesses for their further examination, had been dismissed.

2. Brief facts of the case relevant for the purpose of disposal of this petition are that the FIR in the above-mentioned case has been registered against the petitioner on the allegations that on 23.06.2020, he had committed rape upon the victim(PW-1) who is minor girl aged about ten years by catching hold of her and taking her to an abandoned house. The victim has been examined as PW-1 by the prosecution whereas some more witnesses namely PW-3 Dr. Manjeet Kaur, PW-6 Jaswinder Singh, a teacher of the school wherein the victim has been studying and PW-9 Sohan Singh

Head Teacher of that school have already been examined. The recalling of these witnesses has been prayed for by the petitioner on the ground that the counsel who had been previously representing the petitioner, had not properly cross examined the witnesses produced by the prosecution despite availing opportunity. No cross examination at all of PW1 had been conducted and even PW3 and PW6 had not been properly cross-examined. It is further submitted that new counsel was engaged by the petitioner on 25.07.2023 and then he came to know about this fact. It is also submitted that PW9 was also not cross examined at all due to the reason that there were as many as twenty-seven cases with his counsel on that particular date of hearing and he could appear in this case at 4:00 PM when opportunity to conduct cross examination of PW9 was already ordered to be treated as nil.

3. The respondent-State filed reply to the aforementioned application and contested the same. Vide the impugned order dated 19.01.2024, the learned trial Court dismissed the application by observing that sufficient opportunity had been granted to counsel for the petitioner to cross-examine the witnesses but he himself had chosen not to cross examine the prosecutrix and PW-9 and that sufficient opportunity to cross examine other witnesses had also been given which was duly availed.

4. It is argued by learned counsel for the petitioner that the impugned order is liable to be set aside and the petitioner deserves to be given a chance to recall the above mentioned witnesses for the purpose of their cross examination/ further cross examination as the counsel previously engaged by him did not represent him properly and he himself being

unaware about the proceedings of the Court and also due to being in custody was not in a position to compel his counsel to conduct effective cross-examination. It is further argued that a great prejudice would be caused to the petitioner if opportunity so prayed for is not granted and therefore, it is urged by learned counsel for the petitioner that the petition be allowed and the impugned order be set aside and he be permitted to cross examine the above named witnesses including the prosecutrix.

5. Learned State counsel who has advance notice of the petition on the other hand, resisted the claim of the petitioner by submitting that since sufficient opportunities had already been availed by the petitioner for cross examining the witnesses of the prosecution. therefore, he had no right to seek recalling of the witnesses especially of the prosecutrix to protect her from the ordeal of the trial. Therefore, it is argued that petition is liable to be dismissed.

6. I have given due deliberations to the contentions as raised by both the sides and have gone through the record carefully.

7. At the outset, it may be mentioned that the well settled proposition of law is that though the powers under Section 311 of Cr.P.C. can be invoked by the Court to meet the ends of justice and for strong and valid reasons but they should be exercised with great caution and circumspection. This provision confers vast discretion upon the Court and is expressed in the widest possible terms. The discretionary power under the said Section can be invoked to meet the ends of justice and has to be exercised judicially and not arbitrarily or capriciously. The provisions of this

Section should be exercised consistently with the provisions of the Code and the criminal law. Reference in this regard can be made to the judgment of the Hon'ble Supreme Court passed in '*State vs. N. Seenivasagan, (2021) 14 SCC*', wherein it has been observed that the true test for the purpose of this Section is, whether it appears to the Court that the evidence of such person who is sought to be recalled is essential for just decision of the case and to '*Manju Devi Vs. State of Rajasthan (2019) 6 SCC 203*', wherein it was observed that the discretionary powers under section 311 of Cr.P.C. are intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone including the accused.

8. Undoubtedly, an application under Section 311 of Cr.P.C. cannot be allowed only to fill up lacuna in the case of the prosecution or of the defence or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused and even to give an unfair advantage to the opposite party. However, such power can certainly be and must be exercised when the evidence which is likely to be tendered by a witness is germane to the issue involved, while keeping in mind that opportunity of rebuttal, however, must be given to the other party. On applying these principles of law to the instant case, where the petitioner is seeking recall of the prosecutrix and three other witnesses for the purpose of conducting their cross examination, let us consider as to whether he deserves recalling of the aforementioned witnesses for the purpose of their cross examination.

9. Annexure P-2 is copy of statement of the prosecutrix as recorded before the learned trial Court and perusal of the same reveals that she was examined in-chief on 01.03.2021 and her cross examination was deferred to 23.01.2023 on the request of learned counsel for the present petitioner. On 23.01.2023, her statement was recorded as follows:-

“PW-1 on SA Meena Rani aged 17 years (DOB 22.12.2005) daughter of Gurcharan singh son of Subhash Singh, resident of Village Arni Wala Sheikh Subhan, Tehsil & District Fazilka.

*Recalled for cross examination by Sh. Sanjeev Kamboj
Advocate counsel for accused.*

Nil opportunity given.”

10. This clearly reflects that not even a single question was put to the prosecutrix by the counsel who was representing the petitioner at that time though he was present in the Court. However, the question is as to whether the petitioner deserves denial of opportunity to conduct cross-examination of PW1 who is the most material witness of the case and on whose statement the fate of the petitioner depends. In the considered opinion of this Court, the answer should be in negative. No doubt a party should not be allowed to fill up lacuna in its case under the garb of an application under section 311 of Cr.P.C. However, in this case, it is quite evident that it was on account of lapse on the part of the counsel who was representing the petitioner that the cross-examination of PW1 had not been

conducted at all. This lapse on the part of counsel for the petitioner cannot be treated as a punishable lacuna which cannot be cured by this Court in exercise of power under Section 311 of Cr.P.C., as it clearly appears that the said counsel was absolutely casual and negligent in performance of his duty as a counsel who is expected to defend the case of his client with all sincerity and devotion. Rather in the opinion of this Court, it was the duty of the learned trial Court also to be conscious of the fact that the testimony of PW1 was being closed without asking even a single question in cross-examination by counsel for the petitioner. In this regard, this Court relies upon the observations made by the Supreme Court in '**Ram Avtar Vs. State of Haryana, AIR, 1981 Supreme Court 1036**' wherein it was observed as follow:-

“ The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past.

"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to

advance the cause of justice. For that purpose he is expressly invested by [section 165](#) of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. [Section 172 \(2\)](#) of the Code of Criminal Procedure enables the Court to send for the police diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial."

11. In the light of the discussion as made above, this Court opines that since not even a single question was put to her during the cross-examination on behalf of the petitioner that would certainly have enabled the trial Court to come to a correct finding, therefore, it would be essential to permit him to get the cross-examination of PW1 conducted not only to elicit the truth but also for just decision of the case.

12. Similarly, PW-9 Sohan Singh, Head Teacher had been summoned by the prosecution for the purpose of proving the record as to date of birth of the prosecutrix in the school, wherein she had been studying as well as PW-6 Jaswinder Singh, teacher of that school had been summoned by the prosecution for the purpose of proving the age of the prosecutrix. The cross-examination of PW-9 Sohan Singh had been closed with the same observation that counsel for the petitioner was given opportunity to cross examine him but the same was not availed and hence was ordered to be treated as nil whereas the testimony of PW-6 was closed by asking a single question by learned counsel for the petitioner to the effect that he was

deposing falsely which was denied by this witness.

13. Learned counsel for the petitioner has argued that cross-examination of both these witnesses was infact required to be done in detail so as to elicit information that the prosecutrix was actually minor as on the date of alleged occurrence and the date of birth as recorded in her school was correct but the petitioner was also deprived of that opportunity. Then with regard to the PW-3 Dr. Manjeet Kaur who had conducted medico legal examination of the prosecutrix and had prepared medico legal report as well as report with regard to the fact that the victim was subjected to rape or not, only a single question that a false report had been given to her, was put. It clearly appears that the approach of the counsel defending the petitioner had remained totally languid and that is why he had remained very casual when he had appeared to cross examine the above named witnesses. In the opinion of this Court, permitting the petitioner to cross examine all these witnesses by recalling them would not amount to filling up the lacuna in his case as a lacuna cannot be equated with the failure of a person who is not in a position to do that for himself either for producing relevant material or in eliciting relevant answer during trial. Any latches or mistakes during conducting of a case cannot be understood as a lacuna which a Court is not competent to fill up. The learned trial Court had observed that the victim cannot be ordered to be recalled to face ordeal of repeated cross-examination when sufficient opportunities had already been availed. However, in the instant case, one cannot be stated to be a case wherein sufficient opportunities had been availed by the petitioner for that purpose. Rather in the opinion of this Court,

no effective opportunity could be availed by the petitioner on account of lapse on the part of his counsel and he should not be made to suffer for the same. He is facing a serious charge and must be given a fair opportunity to defend himself, as there is no cross-examination what to say of effective cross examination conducted of the aforementioned witnesses at the instance of the petitioner. Considering the fact that the petitioner is facing charge for an offence which is serious in nature, the nature of the cross-examination conducted by his counsel and in view of the discussion as made above, in the opinion of this Court, PW-1, PW-3, PW-6 and PW-9 can certainly be ordered to be recalled for the purpose of their cross examination. Therefore, the petition is allowed, the impugned order is set aside, the trial Court is directed to recall PW-1, PW-3, PW-6 and PW-9 and the petitioner is permitted to conduct their further cross-examination. However, it is also directed that the petitioner as well as trial Court shall ensure that cross-examination of these witnesses is conducted on the same day when they will appear for that purpose, in an expeditious manner and the petitioner shall not do any act to protract the proceedings.

[MANISHA BATRA]
JUDGE

31st January, 2024
Parveen Sharma

1. Whether speaking/ reasoned

:

Yes / No
2. Whether reportable

:

Yes / No