

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CRM-M No.53637 of 2023 (O&M)

Date of Decision: 13.02.2024

Habib Ur Rehman

... Petitioner

Versus

The State of Haryana

... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Gautam Dutt, Advocate,
for the petitioner.

Mr. Arjun Lakhanpal, Addl. AG, Haryana.

MANISHA BATRA, J.(Oral)

1. The instant petition has been filed under Section 482 of Cr.P.C. by the petitioner seeking quashing of order dated 07.10.2023 passed by the Court of learned Additional Sessions Judge, Gurugram in Sessions case bearing No.109 of 2021 having arisen out of FIR No.356 dated 02.11.2020 registered under Sections 304-B, 302, 406, 120-B and 34 of IPC at Police Station Kherki Daula, Gurugram whereby an application filed under Section 311 of Cr.P.C. by the petitioner for recalling 16 witnesses for further cross-examination had been dismissed.

2. Brief facts of the case relevant for the purpose of disposal of this petition are that the petitioner is facing trial for commission of offences punishable under Section 304-B and 406 read with Section 34 of IPC on the basis of written complaint filed by the complainant Vinay Ratta alleging that his daughter Hitaksha Ratta had eloped with the petitioner and got married with him in the year 2018. They came into

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contact with her again after three months thereafter. His daughter along with the petitioner had come to his house and three months after her marriage with him, and at that time, he had given dowry as per his status and had spent good amount of money. A female child was born to his daughter on 15.05.2020. He alleged that thereafter, the petitioner had started demanding dowry from the daughter of the complainant. He used to misbehave with her by physically assaulting her and by quarreling with her on account of demand of dowry. His mother also joined him in the same. The complainant alleged that he had requested the mother of the petitioner to make the petitioner understand but she did not give any satisfactory reply. His daughter used to tell them that after the birth of her female child, the petitioner and his mother had started harassing her more on account of demand of dowry. The complainant was not even allowed to visit the matrimonial house of his daughter and the petitioner had even changed his old residence. He alleged that on the same night, he had received a call from the petitioner about the death of the victim and on reaching the hospital, he found the dead body of his daughter to be lying with a ligature marks on her neck. While alleging that the mother of the petitioner used to make demand of car, cash and gold and that his daughter had been killed on account of demand of dowry, he prayed for taking action against them. The petitioner is presently facing trial for commission of offences punishable under Sections 304-B, 302, 406 and 120-B read with Section 34 of IPC.

3. The present petition has been filed by the petitioner on the grounds that during the pendency of the trial, he had filed an application under Section 311 of Cr.P.C. making prayer with the trial Court to recall 16 witnesses as examined by the prosecution for the purpose of conducting their

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cross-examination by submitting that both the petitioner and his mother were in jail since the date of incident. They did not have any access to the case file. After being released from jail, the mother of the petitioner had consulted with some experts and then they had come to know that some material witnesses had not been properly cross-examined by the lawyer who had been engaged by them. It was submitted that, thereafter, the petitioner had changed his counsel before the trial Court and had moved application for recalling some witnesses i.e. PW-1 to PW-3, PW-7 to PW-9, PW-12 to PW-16, PW-18 to PW-22 but the said application had been dismissed. It is submitted in the petition and 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 an opportunity to cross-examine these witnesses as non cross-examination would cause serious prejudice to him. It is, therefore, argued that the petition may be allowed and opportunity may be granted to the petitioner to further cross-examine these witnesses so that no prejudice is caused to him.

4. During the course of arguments, learned counsel for the petitioner has very fairly stated that he does not press the reliefs as claimed by the petitioner for examining all the 16 witnesses whose names have been mentioned in the application and restricts his claim only with regard to further recall and cross-examination of witnesses namely, PW-7 Dr. Deepak Mathur, PW-8 Dr. Manish Jha, PW-13 HC Manoj, PW-19 SI Karambir and PW-22 SI Dinesh Kumar. It is submitted that all these witnesses were examined in chief but while cross-examining them, the learned trial Court had mentioned as follows:-

“NIL. Opportunity given”

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By the above, it means that even after availing opportunity, the petitioner did not choose to cross-examine these witnesses.

5. The petitioner's counsel also argued that as certain important questions were left to be asked from PW-12 Constable Pawan Kumar, therefore, his recall is also essential for just decision of the case.

6. Per contra, learned State counsel who has advance notice of the petition has vehemently resisted the claim of the petitioner by submitting that proper opportunity to cross-examine the aforementioned witnesses had been granted to the petitioner and it was his own counsel who did not avail the same and as such, at this stage, he had no right to seek recall of the said witnesses. With these submissions, it is stressed by him that there is no merit in the petition and the same is liable to be dismissed.

7. I have heard learned counsel for the petitioner as well as learned State counsel and given due deliberations to the contentions as raised by both the sides and have gone through the record carefully.

8. 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, AIR 2021*

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Supreme Court 2441', 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.

9. 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 six 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 ?

10. Learned counsel for the petitioner has placed on record copies of statements of PW-7, PW-8, PW-13, PW-19 and PW-22. For the facility of reference, this Court considers it proper to reproduce the statement of one of these witnesses to show the manner in which the opportunity to cross-examine these witnesses had been given to the petitioner. As such, the

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statement of PW-7 Dr. Deepak Mathur, Medical Officer, GH, Gurugram is hereby reproduced as under:-

“PW-7: Dr. Deepak Mathur, MO, GH, Gurugram.

(Information and deposition of the witness recorded before me (Ashwani Kumar, Addl. Sessions Judge, Gurgaon today i.e. 23.02.2022 who on oath saith as under):

(I am conversant with English language)

I tender my duty sworn affidavit Ex. PW7/A which may be read in my evidence. PMR of deceased Hitakshi Ratta is Ex. P9 and the cause of death in this case is ASPHYXIA FOLLOWING ANTE MORTEM NECK COMPRESSION BY LIGATURE, EXTERNAL LIGATURE MARK ON THE NECK IS SUGGESTIVE OF LIGATURE STRANGULATION, HOWEVER EXACT MANNER WILL BE GIVEN AFTER RECEIVING BLOOD CHEMICAL ANALYSIS REPORT AND CIRCUMSTANTIAL CORROBORATION. The same was prepared after going through the inquest report which is Ex. P10 which also bears my signatures on each page. All the documents were signed by me and Dr. Pawan Chaudhary.

Cxxxn by Sh. Hemant, proxy counsel for Sh. Arvind Kumar, learned defence counsel.

Nil. Opportunity given.

RO&AC (Ashwani Kumar)
ASJ/Gurugram 23.02.2022”

11. On a perusal of the statement of PW-7 as reproduced above, it is very much clear that on the day when PW-7 Dr. Deepak Mathur had been examined, the original counsel for the petitioner was not present and it was

one Sh. Hemant, proxy counsel in whose presence, this witness was

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examined in chief and thereafter, the evidence of this witness was closed by assuming that opportunity was given but was not obtained. In the same manner, PW-8 Dr. Manish Jha, Orthopedic Surgeon, Genesis Hospital, Gurugram was examined in the presence of proxy counsel for the petitioner and evidence of this witness was also closed by observing "NIL. Opportunity given". Then the examination-in-chief of PW-13 HC Manoj was also conducted in the presence of proxy counsel for the original counsel and his evidence was also closed without asking even a single question. Further, though PW-19 SI Karambir and PW-22 SI Dinesh Kumar are shown to be examined in the presence of counsel representing the petitioner but he too despite availing opportunity to cross-examine these witnesses, did not ask even a single question and opportunity given to him was closed. All this goes to show that the counsel who was representing the petitioner did not bother to watch his interest and to cross-examine the witnesses properly and it was a lapse on his part that the aforementioned five witnesses were not cross-examined on any point whatsoever. However, such lapse 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 counsel representing the petitioner remained casual in performance of his duties. Rather in the opinion of this Court, it was the simultaneous duty of the learned trial Court also to be conscious of the fact that the testimonies of these witnesses was being closed without asking even a single question in cross-examination and that too when in case of three witnesses even original counsel for the petitioner was not present in the Court. At this juncture, this Court finds it proper to refer to the observations made by Hon'ble Supreme

Court in '*Ram Chander Vs. State of Haryana, AIR, 1981 Supreme Court*

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1036' which are as follows:-

“ 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."

12. In the light of the discussion as made above, this Court holds that since not even a single question was put to the aforementioned witnesses during cross-examination on behalf of the petitioner though that

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would certainly have enabled the trial Court to come to a correct finding, therefore, it would be essential to permit the petitioner to cross-examine these witnesses not only to elicit the truth but also for the just decision of the case. The learned trial Court, while passing the impugned order, had observed that the petitioner and co-accused were themselves delaying the trial and had also examined that they have been changing their lawyers frequently on adjourned dates of hearing and had changed as many as seven advocates. That might be so. However, still in view of the fact that the petitioner is facing trial for commission of serious offence, he must be given a fair opportunity to defend himself. Therefore, this Court allows the petitioner one opportunity to conduct cross-examination of the aforementioned five witnesses.

13. So far as PW-12 Constable Pawan Kumar is concerned, the recall of this witness has been prayed for by the petitioner on the ground that though he was examined by learned defence counsel but certain questions regarding recovery, arrest and investigation could not be put to him. In my considered opinion, that cannot be stated to be a reasonable ground for the purpose of recalling this witness as proper opportunity for conducting cross-examination of this witness is shown to be availed by the petitioner. With these observations, the present petition is partly allowed and one opportunity is granted to the petitioner to cross-examine PW-7, PW-8, PW-13, PW-19 and PW-22 as their cross-examination would not amount to fill up the lacuna in the case of the petitioner the reason being the fact that 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 answers during trial. Any latches or mistakes during conducting of a case cannot be

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understood as a lacuna which the Court is not competent to fill up. Accordingly, the petition is partly allowed. The impugned order is set aside to the extent to which the prayer made by the petitioner to recall PW-7, PW-8, PW-13, PW-19 and PW-22 for conducting their cross-examination had been declined. However, it is further directed that the petitioner as well as trial Court shall ensure that the cross-examination of the aforementioned witnesses shall be conducted on the same day when they will appear for that purpose in the Court and no further adjournment for that purpose would be granted by learned trial Court to the petitioner and the petitioner would not be allowed to do any act to protract the proceedings by taking any plea.

13.02.2024
manju

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No