

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

CRM-M-14363 of 2015

Date of decision: 05.05.2015

Rakesh Kumar

----Petitioner (s)

V/s

State of Punjab & another

-----Respondent(s)

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Amit Dhawan, Advocate
for the petitioner(s).

HARI PAL VERMA, J. (Oral)

Through the instant petition filed under Section 482 CrPC, the petitioner has sought quashing of order dated 6.4.2015 (Annexure P6), whereby on an application filed by the complainant through Additional Public Prosecutor under Section 311 CrPC, learned Additional Sessions Judge, Jalandhar has allowed the prosecution to produce on record the photographs and CD which were not produced by the police while submitting report under Section 173 CrPC.

Briefly stated, the petitioner got married with the complainant namely Paloma Kumari (respondent no.2) on

19.10.2009. The complainant was B.A B.Ed., PGDCA at the time of marriage. The petitioner co-operated with complainant-respondent no.2 and extended financial support to her, so that she may pursue her further studies. Accordingly, the complainant did her M.Sc. (I.T.) from Punjabi Technical University, Jalandhar, but despite extending full cooperation by the petitioner and his family members, the complainant treated them rudely. She used to abuse them, so that the petitioner may live separately from his family after taking his share from his parents.

It is the case of the petitioner that when the petitioner refused to accept her unlawful demands, she made a complaint dated 11.6.2012 to the police, alleging harassment and demand of dowry. She even went to the extent of levelling vague allegation of forcible termination of her pregnancy against the petitioner and his family. A case FIR No.63 dated 29.7.2012 under Sections 406, 498-A IPC was registered against the petitioner at Police Station Lambra, District Jalandhar. However, no offence under Section 313 IPC was registered in the said FIR. The petitioner even moved the trial Court and filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. In the meanwhile, the parents of the petitioner submitted a representation for fair enquiry and the complainant also submitted a representation to the concerned police. The matter was looked into by DSP, Sub Division Kartarpur, Jalandhar Rural and the complainant succeeded in getting Section 313 IPC added in the

FIR without there being any truth or without verifying the facts. The police submitted report/challan under Section 406, 498-A, 313 IPC.

While the matter in the aforesaid FIR was pending before the trial Court, the prosecution filed an application dated 30.5.2014 under Section 311 CrPC for placing on record the photocopies and CD to prove its case. The very object of filing such application was aimed at to establish from such CD and photographs that the co-accused of the petitioner namely Bimla Devi was wearing the jewellery of the complainant at the time of marriage of her brother. The petitioner contested the said application and filed reply, denying the allegations made in the application. The petitioner has contended that in fact, the complainant is trying to prolong the trial by making unwarranted applications and the facts which are narrated in the CD/photographs were already in the knowledge of the complainant.

Considering the aforesaid application under Section 311 CrPC as well as the reply submitted by the petitioner-accused that the said CD and photographs sought to be produced by way of additional evidence is not a relevant piece of evidence, the trial Court vide order dated 6.4.2015 has allowed the application filed by the complainant.

It is the aforesaid order dated 6.4.2015, whereby the application of the complainant under Section 311 CrPC for placing

on record the photographs and CDs has been allowed, has been made subject matter of challenge in the instant petition.

I have heard learned counsel for the petitioner.

It will be relevant to reproduce Section 311 CrPC which reads as under:-

“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case”.

Learned counsel for the petitioner has argued that the very purpose of filing such application under Section 311 CrPC is just to fill up the lacuna in the prosecution version. It is submitted that the prosecution had already examined eight witnesses and none of the witnesses had placed any material evidence to indicate that the petitioner and his family ever misappropriated the dowry articles of the complainant. He further argued that no material evidence has come on record to indicate that respondent no.2 was ever harassed by the petitioner or his family for bringing less dowry or to bring more dowry. The CD and the photographs intended to be placed on record by the prosecution were already in the knowledge of the complainant and the same will not prove

the fact that the jewellery which was worn by Bimla Devi was ever belonging to the complainant. He, thus, argued that filing of application under Section 311 CrPC is an abuse of the process of law.

Hon'ble the Apex Court in the case of **Rajaram Prasad Yadav v. State of Bihar and another** 2013(3) RCR (Criminal) 726 has elaborated the powers of the Court while considering the application under Section 311 CrPC. The Hon'ble Apex Court has held that the power vested under the provisions of Section 311 CrPC is made available to any Court at any stage in any enquiry or trial or procedure initiated in Court. The Hon'ble Apex Court observed as under:-

“14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order

of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

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22. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State), Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

“14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a 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, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as ‘any Court’, ‘at any stage’, or ‘or any enquiry’, trial or other proceedings’, ‘any person’ and ‘any such person’ clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative

factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)”

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue

involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

Having perused the impugned order dated 6.4.2015 and considering the fact that the prosecution intends to place on record the photographs and CD, which could not be produced by the police in the report under Section 173 CrPC, the complainant should not suffer for such lapse on the part of the investigating officer by not producing the photographs and CD, which are otherwise necessary for the just decision of the case.

Accordingly, I find no merit in the present petition.

Dismissed.

May 05, 2015
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(HARI PAL VERMA)
JUDGE