

**HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT
CHANDIGARH**

**CRM-M-33071-2015
Date of decision:28.9.2015**

Surinder Kumar Sharma

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

1. To be referred to the Reporters or not ?
2. Whether the judgment should be reported in the Digest ?

Present: Mr.N.S.Sodhi, Advocate for the petitioner.

RAMESHWAR SINGH MALIK, J. (Oral)

Petitioner seeks quashing of order dated 26.8.2015 (Annexure P-1), whereby application moved under Section 311 of the Code of Criminal Procedure ('Cr.P.C.' for short) for recalling of PW-5 and PW-8 for their further cross-examination, was declined.

Learned counsel for the petitioner submits that the learned trial Court misdirected itself, while passing the impugned order. Application moved by the petitioner under section 311 Cr.P.C. ought to have been allowed by the learned trial Court. He further submits that recalling of PW-5 and PW-8 for their further cross-examination was very much necessary for the just decision of the case. However, since the learned trial Court failed to appreciate this crucial aspect of the matter, the impugned order has resulted in serious miscarriage of justice. He prays for setting aside the impugned order, by allowing the present petition.

Having heard the learned counsel for the petitioner, after careful perusal of the record of the case and giving thoughtful consideration

to the contentions raised, this Court is of the considered opinion that in the given fact situation obtaining in the present case, instant one has not been found to be a fit case, warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C. To say so, reasons are more than one, which are being recorded hereinafter.

It is a matter of record that the prosecution evidence has been concluded on 20.8.2015. The case before the learned trial Court was fixed for recording the statement under Section 313 Cr.P.C. of the accused-petitioner. It was at this stage that petitioner moved an application under Section 311 Cr.P.C. for recalling of PW-5 and PW-8 for their further cross-examination. A bare perusal of the impugned order passed by the learned trial Court would show that the same is well justified on facts as well as in law. The learned trial Court has not committed any error of law, while passing the impugned order and the same deserves to be upheld.

In fact, thrust of the argument raised by the learned counsel for the petitioner is that since petitioner has changed his counsel before the learned trial Court, his application under Section 311 Cr.P.C. ought to have been allowed. However, it is not denied and rightly so, it being a matter of record that these very two witnesses PW-5 and PW-8 had been earlier put to lengthy cross-examination by the learned counsel for the petitioner, who was earlier representing the petitioner before the learned trial Court. Having said that, this Court feels no hesitation to conclude that the above-said two witnesses PW-5 and PW-8 could not have been recalled for their further cross-examination, at this belated stage and that too only on the ground of change of counsel and under the pretext that previous counsel did not put certain questions to these witnesses. In this view of the matter, it can be

safely concluded that the learned trial Court proceeded on a factually correct and legally justified approach, while passing the impugned order and the same deserves to be upheld, for this reason also.

During the course of hearing, when a pointed question was put to the learned counsel for the petitioner as to what were those questions, which were not put to PW-5 and PW-8 by the previous counsel representing the petitioner before the learned trial Court, he could not specify even one such question. It prima facie shows that the petitioner is trying to misuse the process of law. No prejudice has been shown to have been caused to the petitioner, by passing the impugned order. The learned trial Court rightly did not find, recalling of the above-said two witnesses, essential for the just decision of the case. Application of the petitioner was rightly declined by the trial Court. He was not found entitled to recall the already cross-examined witnesses for the purpose of their further cross-examination, only because he has changed his counsel, therefore, the impugned order deserves to be upheld.

The above-said view taken by this Court also finds support from the following judgments:-

- (1) Criminal Appeal Nos. 1187-1188 of 2015 (AG v. Shiv Kumar Yadav and another), decided on 10.9.2015 (SC);**
- (2) Baldev Singh v. State of Punjab, 2007 (3) RCR (Crl.) 826 (P&H);**
- (3) Prakash Chandra v. Central Bureau of Investigation, 2012 (5) RCR (Crl.) 197 (Delhi High Court);**
- (4) Mahant Vedanand Saraswati @ Ved Prakash Sharma v. Devendra Kumari Mittal, 2014 (9) RCR (Crl.) 1479**

(Uttarakhand High Court);

(5) **Deshpal and others v. Rati Ram and another, 2010 (1)**

NCC 369 (Uttarakhand High Court);

(6) **Paramjit Singh @ Pammi @ Jagdev Singh v. State of Punjab, 2014 (1) Law Herald 671 (P&H) and**

(7) **Shiv Kumar Yadav v. State, 2015 (219) DLT 76 (Delhi High Court).**

The relevant observations made by the Hon'ble Supreme Court in paras 27 to 29 of its judgment in **Shiv Kumar Yadav's** case (supra), which can be gainfully followed in the present case, read as under:-

“It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere

observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court^{47}. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.*

We may now sum up our reasons for disapproving the view of the High Court in the present case:

- (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;*

- (ii) *No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;*
- (iii) *Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;*
- (iv) *The trial Court as well as the High Court rejected the reasons for recall of the witnesses;*
- (v) *The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;*
- (vi) *Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;*
- (vii) *Mere change of counsel cannot be ground to recall the witnesses;*
- viii) *There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;*
- (ix) *The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;*
- (x) *There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”*

Reverting back to the peculiar fact situation of the present case and respectfully following the law laid down by the Hon'ble Supreme Court, as well as different High Courts including this Court, in the judgments

referred to hereinabove, it is unhesitatingly held that the learned trial Court has not been found to have exceeded his jurisdiction, while passing the impugned order and the same deserves to be upheld, for this reason as well.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the instant petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out

Resultantly, with the above-said observations made, the present petition stands dismissed, however, with no order as to costs.

28.9.2015
mks

(RAMESHWAR SINGH MALIK)
JUDGE