

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Crl. Misc. No.M-10399 of 2015 (O&M)
Date of decision : 25.10.2016**

Vishal Manchanda and others

.....Petitioner(s)

Versus

State of Punjab

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Vaibhav Sehgal, Advocate
for the petitioners.

Mr. Deep Singh, A.A.G. Punjab.

ANITA CHAUDHRY, J.

The issue for consideration in this revision is whether recall of the witness at the stage of defence can be allowed to the accused on the ground that they had changed their counsel.

The facts relevant for deciding the issue are required to be exposted. Ruchi was married to Vishal in December, 2006. A complaint of harassment, cruelty, demand of dowry etc. was made and FIR No.254 was registered in November, 2008. The challan was presented some time in July, 2010. Charge was framed and examination-in-chief of Ruchi was recorded in December, 2011. The cross-examination was got deferred as Court time was over. The cross-examination was effected on a number of

dates. Pawan Kumar, father of Ruchi was examined on the same day as Ruchi was examined. His cross-examination had also been deferred. When he presented himself for his cross-examination in July, 2012 the accused were present in the Court and they were represented by a counsel and opportunity was granted to them but no cross-examination was effected on that witness though cross-examination was effected on Sudesh Rani (mother) – PW5 on different dates.

An application had been given by the complainant side under Section 319 Cr.P.C., which was dismissed in April, 2013. Statement of the accused was recorded in January, 2015 and the case was adjourned for defence evidence & for final arguments when an application was moved for recalling PW4 – Pawan Kumar. The grounds raised in the application read as under:-

2. *That the perusal of the file reveals that PW4 Pawan Kumar could not be cross-examined and the learned Predecessor of this Hon'ble Court has rendered his cross-examination as Nil on 7.7.2012.*
3. *That this fact was never known to the accused/applicants as this was never disclosed by their counsel who was representing the accused persons at that time. Even the accused/applicants had changed their counsel and now it has come to the notice of the counsel for the accused/applicants that the cross-examination of PW-4 Pawan Kumar has rendered as Nil. Despite due diligence, this fact did not come into the knowledge of the accused/applicants. It is worth mentioning here that the accused/applicants are coming from Mumbai to attend this case for several years.*
4. *That the PW-4 Pawan Kumar who is father of the complainant Ruchi Verma is coming regularly to the courts to pursue the matter and the applicants are ready to cross-examine the witness even today without any failure.*

The trial Court sought the reply and heard both the sides and dismissed the application.

The petitioner-accused have filed this petition under Section 482 Cr.P.C. for quashing of the order and seek recall of PW4.

I have heard both the sides.

In order to appreciate the stand of the petitioners, it will be worthwhile to refer to Section 311 Cr.P.C., as well as Section 138 of the Evidence Act. The same are extracted hereunder:

“Section 311, Code of Criminal Procedure 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.

Section 138, Evidence Act 138.

Order of examinations. Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.”

A conspicuous reading of Section 311 Cr.P.C. would show that the Courts are envisaged with the power to summon a witness or to recall or re-examine a witness when it appears necessary for the just decision of the case. The power is made available to the Court at any stage of the trial. The power can be resorted to not to fill up the lacuna. The evidence must not be received as a disguise.

Counsel for the petitioners had contended that the petitioners were residents of Mumbai and did not come to know that no cross-examination had been effected on PW4 and they had changed their counsel and it was brought to their notice then that one witness had not been cross-examined and Pawan Kumar is the father of the complainant and he is appearing on each date of hearing and attending the Court proceedings and can easily be recalled and they were ready to cross-examine the witness on any date that may be fixed.

The submission on the other hand was that the proceedings could show that the petitioners have dragged the proceedings for over five years and they did not complete the cross-examination on one date and the witnesses have been summoned again and again. It was urged that the complainant had been cross-examined on 2 – 3 dates and the examination-in-chief of Sudesh Rani, mother of the complainant was recorded on 29.09.2012 and it was deferred on the request of the defence counsel. It was urged that even the cross-examination on the Investigating Officer was deferred on the request of the defence counsel and the cross-examination was got deferred with a view to delay the proceedings and it was under a planned strategy.

The copy of the statements have been placed on record. Copy of the zimni orders is also available on record which reveal that charge was framed some time in 2010. The zimni orders which have been made available by the petitioners commence from September, 2011 onwards show that last and final opportunity was granted to the prosecution on that day, which means that a number of adjournments had been granted earlier. The

zimni orders also show that repeated applications had been filed before the trial Court seeking exemption for Vishal and Shamma Manchanda. The zimni order dated 07.07.2012 shows that the accused were present in the Court. Their signatures were taken on the zimni and their counsel was also present. The witness Pawan Kumar had stepped in the witness box but no cross-examination was effected and the Court had recorded as Nil, Opportunity given. The prosecution had closed its evidence in January, 2015 and after the statement of the accused had been recorded and the case was fixed for defence evidence then the application was filed for recalling Pawan Kumar.

The trial is pending for over seven years. The FIR was lodged in 2008. The manner in which the trial has been conducted, goes to show that the accused had taken every step to delay the proceedings in one way or the other. The cross-examination on the complainant was deferred for the first time as the Court time was over. It was not completed even on the next date and the cross-examination was deferred on the request of the defence counsel. It was completed after seven months. The trial Court had recorded the statement of the complainant and her father in December, 2011. The accused were present in the Court when Pawan Kumar had stepped into the witness box in July, 2012 and his statement was recorded as nil as the accused chose not to cross-examine him. The defence counsel was also present in the Court. After they had exercised their right to not cross-examine the witnesses, the defence wants to turn around and is asking for cross-examination after four years. The ground raised is that they had changed the counsel and had now come to know. They want to fill up the

lacuna. It has become a tendency to delay the trials on one pretext or the other. I am unable to accept the plea of the accused that the earlier counsel was incompetent or was a novice. No complaint had been given against that counsel.

Considering the facts of the present case and the manner in which the trial has been conducted, it appears that it was with a design that at the earlier stages of the trial, no cross-examination was effected and at a later point they want recall of the witness. It is only an attempt to protract the trial. Court has to weigh the rights of each side and give a fair opportunity to the accused and had also to ensure that the complainant side was not duly harassed. Mere change of counsel would not be a ground to recall the witness. I find no infirmity in the order. The revision is dismissed.

25.10.2016

Sunil

(ANITA CHAUDHRY)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No