

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

Cr. Misc. M 23756 of 2016

Date of decision: 15.7.2016

Angrej Singh

Petitioner

vs.

State of Punjab

Respondent

Present: Mr. Gursimran Singh Bhatia, Advocate.

M.M.S.BEDI,J.

The legality and propriety of order dated 2.6.2016, dismissing an application u/s 311 Cr.P.C. for recalling HC Nishan Singh, a recovery witness, in a case of alleged recovery of 5 grams of heroin, has been challenged. The claim of the petitioner is that the said witness was examined-in-chief on 11.5.2016 but his counsel was suffering from chicken pox and high fever, as such, he was unable to appear in the court. The trial court had been informed but inadvertently the cross-examination of the said witness has been treated as "Nil-opportunity given". The said application has been dismissed by the Special Judge by observing as follows:-

"Hence, prayer has been made for dismissal of the present application. From the perusal of the evidence on record, it can be seen that the witness to whom the applicant/ accused wants to re-call for cross-examination was examined-in-chief on 11.5.2016 and sufficient time and proper opportunity was given to him to cross-examine this witness but even after waiting for whole day, the applicant/ accused did not bother to cross-examine this witness and the cross-examination of said witness was treated as "Nil-Opportunity given". Afterwards,

prosecution closed its evidence, Now at this stage, when the applicant-accused has already availed sufficient time and proper opportunity to cross-examine this witness and the prosecution evidence has already been closed, he cannot be allowed to re-call this witness.”

Notice of motion. On asking of the court, notice has been accepted by Ms. HK Athwal, DAG, Punjab.

I have considered the reasoning given by the Special Judge while dismissing the application u/s 311 Cr.P.C. The claim of the petitioner is that he has been deprived of an opportunity to cross-examine the witness as his counsel was not well on the date of cross-examination i.e. 11.5.2016. The learned Presiding Officer has observed that sufficient time and opportunity has been given to the petitioner for cross-examination of the witness. The petitioner cannot be penalized for non availability of his counsel. Witness HC Nishan Singh being a recovery witness was required to be cross-examined to test his credibility. By observing that “Nil-opportunity given” will tantamount to presumption that the petitioner had admitted the examination-in-chief and did not want to cross-examine the witness. Such a presumption would certainly cause prejudice to the petitioner to face trial. The provisions of Section 311 Cr.P.C. would enable a court to recall and re-examine any witness, after it appears that it is essential for the just decision of the case. In the present case, the denial of an opportunity to cross-examine the said witness will cause prejudice to the petitioner but at the same time it will deprive an opportunity to the trial court to give a just decision by appreciation of evidence.

Without expression of any opinion regarding maintainability of the petition u/s 482 Cr.P.C. the impugned order deserves to be set aside. Accordingly, the petition is allowed and the impugned order is set aside. It is ordered that the trial court shall re-summon HC Nishan Singh for a date

convenient to the court to enable the defence counsel to cross-examine him.

It has been informed by counsel for the petitioner that the case is fixed for today for recording evidence u/s 313 Cr.P.C. Any proceedings conducted during pendency of this petition are subject to the order passed by this court. No doubt inconvenience has been caused to the witness, for which a symbolic cost of Rs. 500/- is imposed upon the petitioner as per *Explanation (2) of Section 309 Cr.P.C.* The cost of Rs.500/- paid by the petitioner, will be got deposited in the appropriate head in the Treasury.

July 15 ,2016
TSM

(M.M.S.BEDI)
JUDGE