

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

Date of Decision:- 9th March, 2016

CRM-M No.482 of 2016

Ram Mehar & Ors.

.....Petitioners.

Versus

State of Haryana.

.....Respondent.

AND

CRM-M No.484 of 2016

Kishan Kumar & Ors.

.....Petitioners.

Versus

State of Haryana.

.....Respondent.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH

Present:- Ms. Rebeca M. John, Senior Advocate assisted by
Ms. Vrinda Grover, Advocate for the Petitioners
(in **CRM-M No.482 of 2016**).

Mr. R.S. Cheema, Senior Advocate assisted by
Mr. Arshdeep Singh Cheema, Advocate for the Petitioners
(in **CRM-M No.484 of 2016**).

Mr. Gaurav Dhir, Deputy Advocate General, Haryana
for the respondent-State.

Mr. Vikas Pahwa, Senior Advocate assisted by
Mr. Harsh Aggarwal, Advocate,
Mr. Aditya Dogra, Advocate and
Mr. Rohit Kaushik, Advocate for the Complainant
(in both petitions).

JASWANT SINGH, J.

1. This common order shall dispose of both the aforesaid two petitions filed under Section 482 Cr.PC as they emerge out of the criminal trial in case FIR No.184 dated 18.07.2012 for offences punishable under Sections 147, 148, 149, 452, 302, 307, 436, 323, 332, 353, 427, 114 of Indian Penal Code registered with Police Station Manesar, District Gurgaon.

In **CRM-M No.482 of 2016** titled as Ram Mehar & Ors. Vs. State of Haryana, 12 accused persons have laid challenge to the order dated 16.12.2015 Annexure P-1 passed by the learned Additional Sessions Judge, Gurgaon-trial Court whereby their application under Section 311 read with Section 231(2) Cr.PC for recalling of the 08 named witnesses has been declined.

In **CRM-M No.484 of 2016** titled as Krishan Kumar & Ors. Vs. State of Haryana, 09 accused have laid challenge to the order dated 16.12.2015 Annexure P-1 passed by the learned Additional Sessions Judge, Gurgaon-trial Court whereby their application under Section 311 read with Section 231(2) Cr.PC for recalling of the 04 named witnesses has been declined.

2. The admitted facts are that the accused-petitioners (in both the petitions) were nominated as accused in aforesaid FIR No.184 dated 18.07.2012 on account of occurrence on 18.07.2012 in the premises of the Maruti Suzuki plant at Manesar resulting into injuries to the official of the company and death of one Mr. Avnish Dev, General Manager. The petitioners (in both the petitions) were arrested in the month of July/August 2012. The investigating agency on conclusion of the investigations filed a

challan dated 08.10.2012 against 148 accused persons including the petitioners (in both the petitions). The charges were framed on 22.08.2013, *inter alia*, under Section 302 of Indian Penal Code. The evidence of the prosecution commenced on 21.01.2014 and was concluded on 02.05.2015. When the case was at the stage of recording of defence evidence the application dated 30.11.2015 (**P-4**) under Section 311 read with Section 231 (2) Cr.PC was instituted on behalf of the 12 accused persons-petitioners (in **CRM-M No.482 of 2016**) seeking recalling of the eight prosecution witnesses out of total 102 examined witnesses, namely PW-1 Vikram Verma, PW-2 Vikram Kazanchi, PW-3 Pradeep Kumar Roy, PW-5 Birendra Prasad, PW-8 Salil Bihari Lal, PW-10 Vikram Sarin, PW-29 Deepak Anand, PW-99 IO DSP Om Parkash for further cross examination.

Another separate application dated 30.11.2015 (**P-4**) was moved by the petitioners (in **CRM-M No.484 of 2016**) seeking recalling of the four prosecution witnesses out of total 102 examined witnesses, namely PW-7 Shobit Mittal, PW-14 Rajeev Kaul, PW-22 Sri Niwasan and PW-28 Umakanta T.S., for further cross examination.

The common ground seeking recalling was that Sh. R.S. Hooda, Advocate , who was the leading defence counsel was critically ill during the trial and due to inadvertence, certain important questions, suggestions with respect to the individual roles and allegations against the respective petitioners, the injuries sustained by the witnesses, as well as the alleged weapons of offence used, had not been put to the said witnesses. It was averred that a fresh team of senior lawyers had been engaged at the final stage thus such inadvertent errors were discovered and needed to be

rectified in order to have a meaningful defence and a fair trial. The said stand was contested by the prosecution and the complainant. Their stand was that the aforesaid witnesses had been thoroughly cross examined at length and change of counsel would not constitute a valid basis for seeking recalling of such witnesses.

3. Learned trial Court vide two separate impugned orders both dated 16.11.2015 (P-1 in both the petitions) dismissed the respective applications. The reasons for declining the recalling of said witnesses are as under:-

- (i) *that the application has been moved at a very belated stage, when the witnesses has already been examined and the prosecution evidence concluded on 2.3.2015 and even defence evidence having been concluded in part.*
- (ii) *It has been observed that the Hon'ble Supreme Court has directed the trial to be concluded expeditiously and, therefore, it is suggestively inferred, though not recorded, that such a recourse would delay the trial in violation of the directions passed by the Hon'ble Supreme Court.*
- (iii) *that the ground of engaging of new lawyers in place of previous counsel, who could not properly conduct the cross examination has been found to be inadequate.*
- (iv) *that the applicants/accused have not explained as to what were the left out questions which were so crucial to the defence of the accused-petitioners.*

4. Learned Counsel for the petitioners have contended that the reasons for declining the recalling of the witnesses are unsustainable in law and, therefore, impugned orders dated 16.12.2015 passed by the learned trial Court are liable to be set aside in view of the following:-

- (a) that the nature and extent of the power vested in the courts under Section 311 Cr.PC to recall the witnesses is couched in the widest possible terms and is not limited

either with regard to the stage at which the powers of the Courts should be exercised or with regard to the manner in which it should be exercised, but is to be guided by what it considers absolutely necessary/essential for the just decision of the case. Therefore, the reason for declining that the application were moved at a belated stage is untenable in law.

- (b) that the Hon'ble Supreme Court vide order dated 17.02.2014 (**P-8**) had directed the learned trial Court to dispose of the trial as expeditiously as possible in the light of the fact that the bail applications of the accused were not being entertained. The trial Court was further directed to examine all the witnesses by 30.04.2014, while permitting the accused-petitioners to prefer bail applications thereafter. Thus the trial Court has totally misconstrued the directions passed by the Hon'ble Supreme Court, more so when the prosecution itself delayed the trial by concluding its evidence on 22.05.2015.
- (c) that no doubt the defence counsel Sh. R.S. Hooda, inspite of his critical illness had conducted the trial for the accused in a reasonable competent manner, however, in view of new team of lawyers engaged having discovered certain omissions on material aspects in the light of possible confusion and oversight due to the joint trial of 148 accused, a fair opportunity to recall and further cross examine the named witnesses should not be denied, more so, when they are facing serious charges including for offence under Section 302 IPC. The reason assumed by the trial Court of inadequacy is thus unwarranted.

- (d) It is submitted that the witnesses are being recalled primarily for tendering suggestions regarding alleged weapons used, injuries sustained by different witnesses and other persons and the manner and circumstances pertaining to how the incident took place as they are very material for the proper defence of the accused and would not consume much time of the Court and, therefore, not delay the trial. It is submitted that the learned trial Court at the time of hearing of the application by way of illustrations was pointed out the omissions and improvements with which the witnesses were required to be confronted, however, the learned trial Court has by one stroke rejected the request by observing that the said crucial left out questions have not been disclosed. Some of the details of such omissions brought to the notice of the trial Court have been reproduced in the body of the petitions from page 27 to 31 (CRM-M No.482 of 2016). That apart it is argued that some of the confrontations cannot be revealed lest they prejudice the defence of the accused.

5. Learned Counsel for the petitioners have next contended that in the facts of the present case, when a joint trial of 148 accused is being conducted, the accused-petitioners are entitled to a fair opportunity to defend themselves by recalling of the named witnesses for further cross examination, failing which would lead to miscarriage of justice. It is argued that the recalled witnesses have to be confronted only with certain formal questions and suggestions that are very material for the proper defence of the accused charged *inter alia* for an offence under Section 302 IPC, that would neither delay the trial nor prejudice the prosecution. The applicants/petitioners are not seeking to raise any fresh grounds in defence

but are merely seeking to correct certain errors committed during cross examination, and as such would not amount to filling up of any *lacunae* in defence. It was also stressed that there is absolutely no effort to turn the testimonies of the recalled witnesses hostile to the case of the prosecution. In support reliance is placed upon the decisions of the Hon'ble Supreme Court reported as **Rajendra Prasad Vs. Narcotic Cell (1999)6 SCC 110**, **Raghunandan Vs. State of U.P. AIR 1974 SC 463**, **P. Chhagan Lal Daga Vs. M. Sanjay Shaw (2003)11 SCC 486**, **P Sanjeeva Rao Vs. State of Andhra Pradesh (2012) 7 SCC 56**.

6. On the other hand learned State Counsel assisted by Counsel for the Complainant has argued that the main thrust for recalling of the witnesses as per the application is the illness of the previous defence counsel Sh. R.S. Hooda, Advocate, which has been rightly dealt with by the learned trial Court while rejecting the application. It has been noticed in para no.9 of the impugned order that the perusal of the statements of the witnesses to be recalled reveals that they had been cross examined at length and there is nothing that the said defence counsel faulted by not putting relevant questions to them. It was further contended that it was Sh. R.S. Hooda, Advocate who was throughout the leading defence counsel who had conducted almost 75% of the cross examination amongst battery of defence lawyers and PW-29 Deepak Anand, the author of the FIR had been confronted nine times during one day with the contents of the FIR Ex.PW-29/A. Therefore, no case of recalling is made out in the light of settled principle of law that a change of counsel does not constitute a valid basis for seeking recalling of the witnesses, as also it would cause undue hardship to

the witnesses and uncalled for delay in the trial. In support reliance is placed on decision of the Hon'ble Supreme Court in **AG Vs. Shiv Kumar Yadav** 2015 SCC Online SC 799 and **Nisar Khan Vs. State** (2006) 9 SCC 386.

7. It is pertinent to mention that an objection was taken by the counsel for the petitioners to the counsel for the complainant appearing and arguing the matter. The same is rejected by this Court in exercise of jurisdiction under Section 482 Cr.PC as it is felt that for a just and proper decision of the case, the assistance is welcome, moreso when the other party has been afforded due opportunity to rebut the contentions.

8. Before coming to the merits of the case, it is apposite to examine the judgments that have been cited at the Bar by both the sides.

In Rajendra Prasad's case (supra), in a trial for offences under the NDPS Act 1985, there was negligence on the part of public prosecutor as he closed the evidence of the prosecution twice without verifying whether cross examination of two material witnesses had been concluded or not. At the stage when part of the final arguments had been heard, an application of the prosecution under Section 311 Cr.PC for recalling the three witnesses was allowed by the trial Court, the revision was dismissed by the learned Single Judge, of the Delhi High Court and the matter was taken to the Hon'ble Supreme Court by the aggrieved accused. It was held that a lacunae in the prosecution is not to be equated with the fallout of an oversight committed by a counsel during trial either in producing relevant materials or in eliciting relevant answers from the witnesses. The mistakes or laches during conduct of a trial cannot be understood as a lacunae which

a court cannot fill up. The relevant para **8** and **12** of the judgment are as under:-

“ 8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

12. We cannot therefore accept the contention of the appeal as a legal proposition that the Court cannot exercise power of resummoning any witness if once that power was exercised, no can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final

arguments. The power of the Court is plenary to summon or even recall any witness any any stage of the case, if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this Case for resummoning certain witnesses cannot therefore be spurned down or frowned at. ”

In Raghunandan's case (supra) during the trial for murder, no question was put either by the prosecution or defence to the Doctor, who conducted the post mortem examination regarding the contents of small intestine and the large intestines could remain in that condition until 1.00 pm during the day assuming that the victim was quite healthy so as to determine the time of death. The Hon'ble Supreme Court held that in a case of death sentence there is to be a closer and more critical scrutiny, and if either party had omitted to put certain questions to the doctor, it was the duty of the Court to ensure that the essential questions were not left unanswered .

In P. Chhagan Lal Daga's case (supra) in a case of trial under Section 138 of the Negotiable Instruments Act, 1881, when the case was posted for judgment, the learned trial Court allowed the application under Section 311 Cr.PC for leading additional evidence in the shape of the postal receipt in view of the accused having denied the service of statutory notice and disowning the signatures contained in the acknowledgement card during his cross examination, the Hon'ble High Court set aside the order passed by the trial Court by holding that the effort of the complainant at the

belated stage was only to fill up a lacunae. The Hon'ble Supreme Court restored the order passed by the trial Court while setting aside the order passed by the Hon'ble High Court by observing that the power to receive additional evidence is dictated by the exigency of the situation and fair play and not by the stage of the proceedings.

Lastly in P Sanjeeva Rao's case (supra) the accused was being prosecuted for offences punishable under the Prevention of Corruption Act, 1988. The accused made an application for recalling of PW-1 and PW-2 for cross examination on the ground that their cross examination had been deferred till such time the trap laying officer PW-11 was examined by the prosecution. Since PW-11 had been examined, the application was moved. It was contested by the prosecution that the cross examination of PW-1 and PW-2 had been recorded as "Nil" and there was nothing on record to show that a right to cross examine PW-1 and PW-2 at a later point of time was reserved. The application was rejected by the trial Court in view of the stand of the prosecution while also holding that recall of the said witnesses after three and a half years would prejudice the prosecution. The Hon'ble High Court upheld the order in revision. The Hon'ble Supreme Court allowed the appeal of the accused while setting aside the orders passed by both the aforesaid Courts. The Hon'ble Supreme Court by examining the entire case law held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving any ambiguity in the statement of the witnesses. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial. A possible prejudice to the

prosecution on account of delay in recalling of the witness is not even a price, leave alone that would justify denial of fair opportunity to the accused to defend himself.

In AG Vs. Shiv Kumar Yadav's case (supra), relied upon by the prosecution/complainant, the accused was charged with the offence of rape. Although he was represented by a counsel through legal aid, subsequently he engaged two private counsel to represent him. After his statement was recorded under Section 313 Cr.PC, an application for recall of the prosecutrix PW-2 and formal witness PW-23 for further cross examination was moved and rejected and was never challenged. Thereafter, fresh counsel was engaged and an application under Section 311 Cr.PC for recall of all the 28 PWs was moved. The application was dismissed by the trial Court but allowed by the High Court in exercise of jurisdiction under Article 227 of the Constitution read with Section 482 Cr.PC. The Hon'ble Supreme Court restored and affirmed the view taken by the trial Court while setting aside the impugned order passed by the Hon'ble High Court. The Hon'ble Supreme Court found that no fault was found with the reasoning of the trial Court and not a single reason was assigned by the Hon'ble High Court while permitting the recall of 13 witnesses for cross examination. The discretion to recall would not be a matter of course but is to be exercised judiciously to prevent failure of justice and for stated valid reasons and not arbitrarily, simply by stating that it would ensure fair trial and serve the ends of justice. The Hon'ble Supreme Court by minutely examining the provisions of Section 311 Cr.PC and 138 of the Indian Evidence Act and the entire case law on the subject, in para 13 of the

judgment culled out the following principles to be borne in mind:-

“ 17.1 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?

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

17.3 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.

17.4 The exercise of power under Section 311 Cr.PC 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.

17.5 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.

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

17.7 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.

17.8 The object of Section 311 Cr.PC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9 *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.*

17.10 *Exigency of the situation, fair play and good sense should be the safeguard, 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.*

17.11 *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.*

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

17.13 *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.*

17.14 *The power under Section 311 Cr.PC 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. ”

In Nisar Khan's case (supra), the five accused/appellants were convicted and sentenced (two of the accused awarded death sentence and rest imprisonment for different periods) for offences *inter alia* under Section 302 IPC by the trial Court. Their appeals were dismissed by the Hon'ble High Court while converting the death sentence of two of the accused into life imprisonment. It was held that the non recovery of the offending car in the course of committing the offence was not a ground to disbelieve otherwise the creditworthy direct evidence of the eye witnesses. The recovery of the arms from a place open to the public on the disclosure statement also could not be held to be not proved in the face of other evidence on record. The principal arguments of the appellants that all the eye witnesses had turned hostile and therefore, the credibility of their testimonies was doubtful, was rejected. It was held that the witnesses were recalled after one year of their earlier testimonies supporting the prosecution, and on account of they having been won over either by money, my muscle power, by threats or intimidation had subsequently turned hostile. In this background of facts, the Hon'ble Court was of the view that witnesses should not be recalled after lapse of more than one year since their earlier testimonies.

9. After giving thoughtful consideration to the rival contentions of the parties in the backdrop of the facts of the cases, this Court is persuaded to accept the plea of the accused-petitioners for recalling of the named witnesses.

We are guided by the clearly laid down legal principles, as

reproduced here above, for invoking the provisions under Section 311 Cr.PC for recalling of the witnesses for further cross examination. Applying those principles to the facts of the present case, in the opinion of this Court a case for recalling is made out to ensure fair opportunity to defend and uphold the concept of fair trial. The conceded fact that 148 accused persons are facing trial together, wherein the prosecution has examined 102 witnesses regarding different roles/weapons/injuries attributed to various accused qua various victims on the day of occurrence stretched over a period of time within a huge area of factory premises, does raise a sustainable inference that there was a confusion during the conduct of the trial leading to certain inadvertent omissions and putting proper suggestions on material aspects, which are crucial for the defence in a trial *inter alia* for an offence under Section 302 IPC, although the accused were represented by battery of lawyers with Sh. R.S. Hooda, Advocate being the lead lawyer. The accused-petitioners are charged with heinous offences including under Section 302 IPC and it was stressed that the purpose of recalling is not to set up a new case or make them turn hostile but only to have a proper defence as it is to be judicially noticed that for lack of proper suggestions by the defence to the prosecution witnesses, the learned trial Courts at times tend to reject the raised defence on behalf of the accused. Some of such omissions and suggestions by way of illustration have been spelt out in the body of the petitions and some are stated to be withheld for avoiding any prejudice to the defence, nevertheless the stated purpose is not to render the prosecution witnesses hostile to the case of prosecution. Hence such inadvertent omissions and lack of suggestions have to be accepted to be

bonafide and constituting a valid reason requiring the approach of the Court to be magnanimous in permitting such mistakes to be rectified, moreso when the prosecution, concededly, were permitted twice to lead additional evidence by invoking the provisions under Section 311 Cr.PC on no objection of the defence, after the closure of the prosecution evidence. The accused-petitioners are in custody and having nothing to gain from delaying the trial. The reasons assumed for declining the recalling in the impugned order dated 16.11.2015 (**P-1**) are clearly misconceived and thus vitiated. It is apparent from the provisions of Section 311 Cr.PC as interpreted by the Courts that the exercise of the power to recall is not circumscribed by the stage at which such a request is made but is guided by what is essential for the just decision of the case. No doubt speedy trial is essential in cases involving heinous crimes, however, nothing has been shown on record that the Hon'ble Supreme Court has specifically laid down a date by which the trial is mandated to be concluded. The order at **P-8** is only in the context of the right of the accused to seek bail. The reliance by the trial Court on AG Vs. Shiv Kumar Yadav's case (supra) and Nisar Khan's case (supra) is also misplaced in the facts of the present cases. In the first case, the trial was for offence of rape and the defence was seeking the recall of all the prosecution witnesses amounting almost to a denovo trial without any regard to the harassment and plight of the young victim. In the latter case, the defence had succeeded in its purpose of turning the already examined witnesses to be hostile to the case of prosecution by recalling them after a period of one year. In the present case the facts are clearly distinguishable as aforesaid.

10. In view of the foregoing discussion, both the aforesaid petitions are allowed, the impugned orders dated 16.11.2015 (**P-1** in both the petitions) are hereby set aside. The respective applications dated 30.11.2015 (**P-4** in both the petitions) under Section 311 Cr.PC seeking recall of the named witnesses are allowed. However, it is made clear that in case the learned trial Court during the cross examination of the such recalled witnesses is of the opinion that such opportunity is being misused to make the witnesses resile from their earlier testimonies, in that eventuality the trial Court would be at full liberty to put a stop to that effort.

**(JASWANT SINGH)
JUDGE**

March 09th, 2016
Vinay