

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

**CRM-M-8524-2015 (O&M)
Date of Decision : 09.12.2016**

Avtar Singh

.....Petitioner

Versus

State of Haryana & Anr.

.....respondents

Present : Mr. Akshay Jindal, Advocate,
for the petitioner.

Mr. Sharad Kumar Yadav, DAG, Haryana
for respondent No.1-State.

Mr. J.S. Mehndiratta, Advocate,
for respondent No.2.

JAISHREE THAKUR, J.

1. This petition under Section 482 Cr.P.C. has been filed challenging the order dated 09.03.2015 (Annexure P1) passed by Learned Additional Sessions Judge, Karnal by which he has allowed an application under Section 311 Cr.P.C by which witnesses have been recalled.

2. In brief, the facts of the case are that FIR No. 412 dated 02.11.2013 under Sections 376(f)(i)(g)(m) IPC and 5(F)(M) and 6 of Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”), at Police Station Indri was registered against respondent No. 2. In the said FIR an allegation had been made that respondent No. 2 being Principal of a school had molested two young children aged four and five years. The matter was committed to the Court of Sessions for trial. After framing of the charges many prosecution witnesses were examined including minor children. In fact they were also subjected to detailed cross-examination by

the defence counsel.

3. By an application dated 05.05.2013, respondent No. 2 accused filed an application under Section 311 Cr.P.C. for summoning of the witnesses PW8 Avtar Singh, PW9 Harpreet Kaur and the minor child PW10 for further cross-examination. In the said application, the reason given for recalling the witnesses was that on account of over sight of the defence counsel who had conducted the cross-examination of the witnesses, certain documents could not be put to the witnesses. The matter was argued and thereafter the Additional Sessions Judge, Karnal allowed the said application by holding that the accused has every right to defend his case and if by over sight by the defence counsel certain documents existing on the file remained to be put to the witnesses, the accused should not be allowed to suffer. However, it was made clear that the cross-examination of the minor child would be conducted in a way the child witness could be cross-examined. Aggrieved against the said order of the recalling of the witnesses for cross-examination, the instant petition has been filed.

4. Learned Counsel appearing on behalf of the petitioner herein submits that the order so passed is liable to be set aside on account of the fact that the defence had ample opportunity to cross-examine the witnesses and the ground that defence counsel had on account of over sight not put certain documents to the witnesses, is not sustainable. It is further argued that in fact a detailed cross-examination had taken place and it is only when there was a change of the counsel, the instant application has been moved which is nothing but an attempt to cover up the lacuna in their case. It is also argued that the trial has been initiated under various Sections of the

POCSO Act which is a special Act and hence, would over ride the normal procedure of conducting a trial. It is argued that Sections 24 & 25 of the Act lay down the procedure for recording of statement of a child and the same has to be dealt with sensitively.

5. Per contra, counsel for respondent argued that scope and the ambit of Section 311 Cr.P.C. is wide and evidence can be led at any time even prior to the passing of the judgment. It is also argued that Section 31 of the POCSO Act itself specifies that the procedure for leading evidence would be governed under the provisions of the Code Criminal Procedure, 1973 (2 or 1974). It is urged that learned Additional Sessions Judge, while passing the order had protected the child witness insofar as the defence counsel was required to furnish the list of questions to the Court in advance so that Court would be able to satisfy itself as to the nature of the questions that are to be put to the said witness. It is submitted that on account of the mistake that has occurred by the counsel by not putting documents to the witnesses in cross-examination, the respondent should not be allowed to suffer.

6. I have heard learned counsel for the parties and with their assistance have gone through the record of the case.

7. Admittedly, the POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Government of India acceded on 11.12.1992 to the Convention on the Rights of the Child, adopted by General Assembly of the United Nations, which had prescribed

a set of standards to be followed by all States parties in securing the best interests of the child. While enacting Act 2012, it was felt that there was need to address issue of sexual exploitation and sexual abuse of children being a heinous crime. Therefore, severe punishment was also prescribed against a person found guilty of committing sexual assault, aggravated sexual assault upon a minor. For this special Courts have been set up and fairly detailed reasons for cross-examination of a minor child by following the procedure as detail in the Cr.P.C.

8. In the instant case the allegations as made out in the complaint are of a heinous crime having being committed upon two minor children by the Principal of the school. The prosecution led its evidence and the minor child was cross-examined as PW10 while the parents were also examined. The defence moved an application for recalling three witnesses namely, PW8 Avtar Singh, PW9 Harpreet Kaur, and PW10 the minor child, on the ground that the defence counsel was not able to put certain documents to the witnesses which were part of the judicial record. Counsel for the respondent argued that this cross-examination was relevant to his defence and in case he was not permitted to re-examine the witnesses his defence would be put in great jeopardy. It is argued that Section 311 Cr.P.C. permits recalling of witnesses even before passing on the judgment. In this regard reliance has been placed on several judgments reported as ***Rajaram Prasad Yadav v. State of Bihar and another, 2013(3) R.C.R. (Criminal) 726, Sheikh Jumman vs. State of Maharashtra, 2012(12) SCC 486 and Iddar & Ors. Vs. Aabida, 2007(3) R.C.R. (Criminal) 909.***

9. It is true, that Section 311 Cr.P.C. permits a person to be

summoned as a witness at any stage of the trial or other proceedings. The Court is also competent to exercise such powers suo motu if no such application has been filed. However, there is a rider that the Court must satisfy itself that it was in fact essential to examine such witness to be recalled for further examination. In the case reported as **Natasha Singh Vs. Central Bureau of Investigation (State) 2013 (3) R.C.R. (Criminal) 368**, it was held as under:

“7. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under the Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.”

10. An argument has been raised by the learned counsel for the petitioner that the application for recalling of the witnesses has been moved only after the change of a counsel and it should not be permitted. Counsel

for the petitioner has pointed out from the pleadings, there has been change in counsel and the application moved for recalling is worded cleverly to read that defence counsel was not able to put certain documents to the witnesses. A perusal of the said application does show that there is a new defence counsel as earlier the cross-examination was conducted by Mr. Sunil Rana, Advocate and the current application has been filed by Sh. Jagmal Singh Jatain, Advocate whereas the cross-examinations had been conducted by Sh. Sunil Rana, Advocate. In ***State of Haryana Vs Ram Mehar and Others, 2016(4) R.C.R (Criminal) 154***, the Apex Court was dealing with a similar situation, wherein application for recalling some prosecution witnesses for cross-examination was made on the ground that counsel engaged earlier by the defence had not put certain questions to the witnesses. The High Court allowed the said application, which order was subsequently set aside by the Apex Court by holding that the accused had engaged counsel of their choice and in such a situation recalling of witness indubitably cannot form the foundation. It was further held that it is normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of litigant. While holding that the approach must be liberal a word of caution was added that magnanimous should not mean to convey individual generosity. The Apex Court in ***State of Haryana Vs Ram Mehar and Others*** (supra) held as under:

“37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief

was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel

who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 Cr.P.C. for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and

the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words “magnanimous approach” and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.”

11. Counsel for the petitioner has also raised an argument that POCSO Act being a special Act over ride the provisions of Cr.P.C. and that evidence has to be led within the provision of the POCSO Act. However, this argument is not sustainable in view of the fact that Section 31 of the POCSO Act itself specifies that the provisions of the Code of Criminal Procedure including the provisions containing bail and bonds shall apply to the proceedings under the Special Court and for the purposes of the provision the Special Court be deemed to be a Court of Sessions, therefore, the application under Section 311 Cr.P.C. would certainly be maintainable. In the instant case adequate protection has been given while laying down the procedure to cross-examine the child witness, which procedure would fall within the procedure detailed under the POCSO Act.

12. The question that arises before this Court is as to whether there is infirmity in the order that has been passed. As has been noted above Section 311 Cr.P.C. gives wide powers to the Court to allow recalling of a witness at any stage provided the Court forms an opinion that the said re-examination/recalling is justified. In the judgment cited as *State of Haryana Vs Ram Mehar and Others* case (supra) the Apex Court has clearly held that allowing recalling of a witness on the ground of change of counsel is not permissible. In the instant case, though not worded in the application it is evident that there is change in the counsel. Cross-examination of the witnesses took place as far back as 12.11.2014 that all witnesses No. 8, 9 and 10 were examined and the instant application has been referred after a gap of almost four months.

13. The Court has to see if such evidence is necessary to facilitate the just and proper decision of the case and to ensure the accused is not denied opportunity to a proper defence. The application filed under Section 311 Cr.P.C. mentions that inadvertently certain documents though available on the judicial file were not put to the witnesses. This can easily be construed to be a lapse on the part of the defence counsel and on that account the accused should not be denied fair trial. Since these documents are already available on judicial file, no prejudice will be caused to the petitioner herein and, therefore, the miscellaneous petition stands dismissed qua the order challenging summoning of PW-8 and PW-9.

14. No doubt, the accused has a right to a defence but the Court is also to consider the age of the child. It would certainly not be in the interest of the minor child to be made to recall incidents that may have receded in

his memory. The occurrence which took place in the year 2012 would be rendered afresh in case such a cross-examination is allowed at this stage. A reading of the application does not indicate as to what documents have to be proved through the minor child. This Court is of the opinion that allowing the minor witnesses to be recalled would be tantamount to opening of fresh wounds of a child of an incident that took place in the year 2012 and the same is not permissible.

15. Therefore, the instant petition is allowed to the extent that summoning of the minor child is held not warranted and order is set aside to that extent.

09.12.2016
SP

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No.