

In the High Court of Punjab and Haryana at Chandigarh

**Criminal Revision No. 66 of 2016
Date of Decision: 19.09.2016**

Aslam and another

....Petitioners

Versus

State of Haryana

....Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. A.S.Brar, Advocate
for the petitioners.

Ms. Dimple Jain, AAG, Haryana.

ANITA CHAUDHRY, J(ORAL)

The petitioners have filed this revision assailing the order dated 24.12.2015 passed by the Additional Sessions Judge who dismissed the application filed under Section 311 Cr.P.C.

Few facts are necessary. Tarsem Singh got an FIR lodged as his daughter who was 15 years was missing. He suspected that she had been enticed. The girl was recovered and her medical was got done. The trial commenced. The prosecutrix made her statement in the Court on 9.4.2015. In the beginning of her statement, she gave her date of birth and that she was a student of 9th class in Government Model Senior Secondary School, Sector-19, Chandigarh and also introduced her birth certificate and the report card but later on chose to make a statement giving a clean chit to the

accused. She stated that the accused who were present in the Court did nothing with her. The witness was turned hostile and was allowed to be cross-examined by the Public Prosecutor. A lengthy cross-examination was effected and thereafter opportunity was given to the defence but they chose not to put any question to her and the cross-examination on their behalf was recorded as 'Nil:-opportunity given'. Tarsem Singh PW-3 the complainant, father of the victim was examined and cross-examined by the defence. The accused were represented by a counsel. The investigating officer was examined on 23.4.2015.

An application under Section 311 Cr.P.C. was moved on 23.12.2015 and accused Aslam and Dilshad wanted recall of the prosecutrix, her father and the investigating officer on the ground that the prosecutrix was not cross-examined by the defence with respect to her age nor any question was put to Tarsem Singh PW-3 also regarding the age. With respect to the investigating officer, it was pleaded that the investigating officer had proved the application and the statement given by the victim under Section 164 Cr.P.C. and they failed to cross-examine the witness on material points. The petitioner had referred to an authority reported in '*Syed Dastageer versus State of A.P. 2006(1) RCR (Criminal) 269*' and had pleaded that the cross-examination was necessary and it would be difficult to reach at a just decision and, therefore, they be recalled for further cross-examination.

Counsel for the petitioners has placed reliance upon '*M/s Shareen Hire Purchase Pvt. Limited versus Kulwinder Kaur 2011(3) R.C.R. (Criminal) 299*', '*Aman Kumar versus State of Haryana 2015(6) R.C.R. (Criminal) 350*', '*Rupa versus State of Haryana 1997(1) CLJ*

(Criminal) 264' and '**Mahaboosa Begum and others versus Tamil Nadu Wakf Board and another 2015 (11) JT 291'** and it was urged that full justice has not been done to the accused and they have been deprived of full length cross-examination and no question was put with respect to the age of the prosecutrix and the prosecution is pleading that the girl was a minor and they were taken by surprise and recall can be allowed at any stage even after the conclusion of evidence.

On the other hand, the submission on behalf of the State was that recall cannot be allowed as the accused were fully represented by a counsel and since the prosecutrix had turned hostile, therefore, they did not chose to put any question to her and opportunity was granted by the Court. It was urged that the entire evidence is over and the case is now fixed for final orders and the case is pending because of the stay by this Court.

The petitioners are facing trial under Section 376 IPC. The father of the girl had lodged the FIR that her minor daughter had been kidnapped. After her recovery, her medical was got done and charge under Section 376 (D) IPC and Section 6 of the POCSO Act was framed. The accused are represented by a Lawyer from the very beginning. Six months after the main witnesses had been examined, the application under 311 Cr.P.C. has been moved. The accused were given the right to cross-examine. The accused failed to cross-examine the prosecutrix and the reasons are obvious as the prosecutrix failed to support the prosecution at the trial. The father of the prosecutrix was examined on the same day who were cross-examined at length by the defence counsel. After the prosecution had produced the DNA report it dawned upon the petitioners that there could be some difficulty they did not question the birth certificate

introduced by the prosecutrix in their statements. The trial Court rejected the application observing as under:-

“8. The victim has appeared in the witness box as PW-2 and has stated about her date of birth with reference to her birth certificate (Ex. PB) and report card (Ex. PC) but the victim has categorically denied that the accused persons present in the court did anything to her. At the request of learned Public Prosecutor, the victim was declared hostile and the prosecution was given opportunity to cross-examine the victim with reference to her previous statements. Interestingly, the then learned defence counsels did not cross-examine the victim despite giving them the opportunity. On the other hand, victim's father has appeared as PW-3 and he was duly cross-examined. Similar is the case of SI Sawan Dass (PW5).

9. It is well settled law that frivolous applications should not be allowed in the garb of interest of justice. Power u/s 311 of the Code is to be used sparingly and cautiously. Learned Public Prosecutor has rightly pointed out that the defence counsels omitted to cross-examine the victim as she supported the defence version instead of the prosecution version and at the time, the defence did not prefer to cross-examine the victim with reference to her age. The necessity has been arisen on account of DNA profiling report which is against accused Aslam and Dilshad. Now, the defence wants to bypass the DNA profiling report by procuring from the mouth of the victim that on the date of alleged incident she was above the

age of eighteen years.”

The Apex Court in ***State (NCT of Delhi) versus Shiv Kumar Yadav and another 2016(2) Supreme Court Cases 402*** had dealt in detail the object and the width of the power under Section 311 Cr.P.C. and in para 29 summed up the reasons for disapproving the view of the High Court whereby it had allowed the application under Section 311 Cr.P.C., as under:-

“29. 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.”

The accused has a fundamental right to defend his case and the Court has to ensure that he is represented by a counsel. The accused were represented by a counsel from the very beginning. It was not the case of the petitioners that the counsel conducting the trial was physically or mentally unfit on the ground of any disability. The fact that the cross-examination was not proper would not be a ground for recall. Recall of the witness is not to be allowed on mere asking or for the reasons related to mere convenience

or to fill up the lacuna. Fair opportunity had been granted to the defence.

I find no illegality in the order passed by the Court below.

Petition is dismissed.

(ANITA CHAUDHRY)
JUDGE

September 19, 2016
Gurpreet

Whether speaking/reasoned	:	Yes
Whether reportable	:	No