

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-17858-2016
Date of decision : 20.02.2017

Kuldeep

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Sandeep K. Sharma, Advocate, for the petitioner.

Mr. Ramesh Kumar, Assistant Advocate General, Haryana,
for the respondent.

LISA GILL, J. (ORAL)

Prayer in this petition is for quashing of order dated 29.04.2016 (Annexure P-3) passed by the learned Additional Sessions Judge, Panipat, vide which, application under Section 311 of the Criminal Procedure Code filed by the petitioner has been dismissed.

The child witness/victim PW1 was examined before the learned trial Court on 17.02.2016. It is noted by the learned trial Court that while examination-in-chief of the victim was recorded at about 2:30 p.m., counsel for the petitioner had not appeared. When the case was called on earlier occasions on the said date, each time the counsel's clerk had appeared and stated that the advocate is struck in a traffic jam in Rohtak. However, a statement was made by the learned counsel for the complainant that the defence counsel was seen in the Court on the said date. The learned trial Court then observed that the witness is a child of tender age, who has been waiting in Court since morning. The counsel for the accused did not appear in Court for reasons best known to him and the examination of the witness was being delayed. In this view of the matter, while opining that

sufficient/proper opportunities have been afforded to the petitioner for cross-examining the witness but the same was not availed by him, the witness was discharged by the learned trial Court.

Aggrieved therefrom, an application under Section 311 Cr.P.C. was moved by the petitioner stating that cross-examination of PW1 could not be conducted on 17.02.2016 due to non-appearance and negligence of the previous counsel of the applicant/accused. It is noted that this application was filed through another counsel. This application was heard and dismissed by the learned trial Court on 29.04.2016 while observing that sufficient/proper opportunities were provided to the defence for cross-examination of PW1. Furthermore, an order discharging a witness cannot be recalled.

Consequently, the present petition was preferred before this Court. While issuing notice of motion, this Court, on 23.05.2016, directed that the trial would continue but the final order in this case be not passed.

Learned counsel for the petitioner vehemently argues that the petitioner has been deprived of a very valuable right. Cross-examination of PW1 could not be carried out due to the conduct of his earlier counsel and for the mistake of the counsel, the petitioner should not be penalized. The prejudice caused to him is extremely grave. It is further submitted that the petitioner is confined in District Jail, Karnal, therefore, there is no default on his part. He was not even in a position to personally secure the presence of his lawyer on the said date. Learned counsel relies upon the judgment of the Hon'ble Supreme Court passed in **P. Sanjeeva Rao Vs. State of A.P**, 2012 (7) SCC 56.

Learned counsel for the State has opposed this petition but is

unable to deny that right of cross-examination of a witness and that too of the alleged victim is indeed an important right available to the accused.

In the case of *P. Sanjeeva Rao* (Supra), the Hon'ble Supreme Court permitted the recall of witnesses nearly four years after their examination-in-chief. It was observed as under:-

“But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.”

It is observed by the Hon'ble Supreme Court in the aforesaid case that looking to the consequences of denial of opportunity to cross-examine the witness it is preferable to err in favour of the appellant.

In the present case, the petitioner is admittedly behind bars in this case. Denial of an opportunity to cross-examine PW-1 will indeed cause grave prejudice to the petitioner. Therefore, keeping in view the factual matrix of this case, it is considered just and expedient to grant one more opportunity to the petitioner to cross-examine the witness PW-1, subject to costs of Rs.15,000/-, to be paid to the child witness/victim.

Petition is, accordingly, disposed of.

20.02.2017
adhikari

(LISA GILL)
JUDGE

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.