

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

**Criminal Misc. No.M-25896 of 2016 (O&M)
Date of Decision: November 10, 2017**

Dinesh Kumar

.....PETITIONER(s).

VERSUS

The State of Haryana and another

....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Ajay Pal Singh, Advocate
for the petitioner (s).

Mr. Amrik Narwal, D.A.G. Haryana.

Mr. Virender Kumar, Advocate
for respondent No.2.

SURINDER GUPTA, J.

This is petition under Section 482 Code of Criminal Procedure (for short-Cr.P.C.) filed by Dinesh Kumar, who is facing trial in case bearing FIR No.564 dated 04.08.2014 registered at Police Station Sadar Karnal for the offences punishable under Section 302, 201 read with Section 34 of Indian Penal Code, for setting aside impugned order dated 25.05.2016, vide which learned trial Court allowed the application under Section 311 Cr.P.C. filed by respondent No.2-wife of deceased Ravi Kumar for permission to appear as witness with the observation that ends of justice essentially demands that she is a material witness and her examination is essential to unfold the mystery behind the double murder.

Learned counsel for the petitioner has argued that the

occurrence in this case whereby the husband of respondent No.2 and one Rakesh were murdered, took place on 28.04.2017. FIR was registered on 04.08.2014. The police after investigation presented the challan on 30.11.2014 and charges were framed on 30.04.2015. Thereafter, complainant Jaipal son of Neki Ram, father of the deceased appeared as PW1 on 08.07.2015 and his cross-examination was concluded on 28.03.2016. It was at this stage that wife of deceased moved application under Section 311 Cr.P.C. alleging that she had appeared before the police during investigation and narrated the true facts. She was assured that her statement will be recorded and attached with the challan. Now, she came to know after inspection of court file through counsel that her name is not mentioned in the list of witnesses. She is not a material witness in this case and police never recorded her statement. She had remained silent for a period of about two years and filed the present application immediately after recording of statement of her father-in-law. It appears that attempt is being made to fill up the lacunae. Observation by trial Court that she is material witness has no basis as she is neither an eyewitness nor was present at the place of occurrence.

Learned State counsel and learned counsel for respondent No.2 have argued that respondent No.2 being the wife, was aware of the facts, which took place immediately before murder of her husband. Those were narrated by her to her father-in-law as well as to police but the police cited father-in-law of respondent No.2 as witness, who initially supported the prosecution case but in cross-examination resiled and stated that there was no dispute of money of his son Ravi with Dinesh or other accused on the

day of alleged occurrence. After the death of her husband, respondent No.2 was shunted out of her matrimonial home and her father-in-law with ulterior motive has settled the dispute with the accused. The Court on appreciation of facts of the case has committed no error of law while observing that respondent No.2 is a material witness in this case.

Section 311 Cr.P.C. confers vast powers on the trial Court to summon any person as witness whom the Court considers to be material and essential in order to decide the matter. Learned trial Court has observed that respondent No.2 is a material witness and her examination is essential in order to unfold the mystery behind the double murder. Even if father of deceased Ravi has been examined but still respondent No.2 claims to have information about the facts which took place immediately before the alleged occurrence. The mere fact that her statement was either not recorded or not made part of the challan, is no reason to decline the application moved by respondent No.2. Her statement has become more material as her father-in-law (father of deceased Ravi), who initially supported the prosecution case has taken a somersault in cross-examination while stating that petitioner and other accused did not have any dispute with deceased Ravi on the day of occurrence. Appearance of respondent No.2 will help the Court to reach a just conclusion. By declining her application to appear as a witness will deprive the Court of having material evidence regarding the occurrence which may be material but at the same time, no prejudice shall be caused to the petitioner or other accused by examination of respondent No.2 as witness.

Learned counsel for the petitioner has relied on observations in

case of *Mannan Sk. and others Vs. State of West Bengal and another* **2014(5) SCC (Cri.) 547**, wherein Hon'ble Apex Court has observed in para 10 as follows:-

“10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word ‘shall’. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words ‘essential to the just decision of the case’ are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it’s exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the

prayer for recall is genuine.”

In that case, the application under Section 311 Cr.P.C. was moved after a gap of about 20 years to produce a statement on record which was declined by the trial Court but allowed by the High Court. Hon'ble Apex Court dismissed the appeal against the order of the High Court and allowed the statement of deceased to be produced on record.

Learned counsel for the petitioner has also relied upon observation of Hon'ble Apex Court in case of ***Rajaram Prasad Yadav Vs. State of Bihar and another 2013(3) R.C.R. (Criminal) 726***, wherein the Apex Court laid down the principle to be borne in mind while dealing with an application under Section 311 Cr.P.C. and observed as follows:-

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

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

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

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

g) 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.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C. 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.”

While applying the above principles to the facts of the present case, it is evident that learned trial Court while allowing the application under Section 311 Cr.P.C. was of the opinion that testimony of respondent No.2 was required for just decision of the case- a fact which find no reason to rebut or discard. In view of the facts and circumstances discussed above, the citations referred above are of no help to the plea raised by learned counsel for the petitioner.

This petition has no merits. Dismissed.

November 10, 2017
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***