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IN THE HIGH COURT OF PUNJAB & HARYANA  
AT CHANDIGARH

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CRM-M No. 32932 of 2017  
Date of Decision: 25.10.2017

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Kuljit Kumar and others

..... Petitioners

Versus

State of Punjab

..... Respondent

**CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA**

Present: Mr. Jagjot Singh Lalli, Advocate,  
for the petitioners.

Mr. Hittan Nehra, Additional Advocate General, Punjab.

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**SUDIP AHLUWALIA, J. (ORAL)**

In this petition, the petitioners, who are the accused in the ongoing trial arising out of F.I.R. 90, dated 11.10.2013, under Sections 307, 326, 452, 324, 323, 506, 148 and 149 of the Indian Penal Code, registered at Police Station Lambra, District Jalandhar, have sought quashing of the impugned order dated 18.08.2007 (Annexure P-4), passed by the Additional Sessions Judge, Jalandhar, whereby the prosecution's application under Section 311 of the Code of Criminal Procedure for re-summoning and re-examining PW-6, who happens to be the Retired Police Inspector, to prove/exhibit the case property was allowed.

2. The petitioners have assailed the impugned order by asserting that in allowing the application, the Ld. Trial Court has virtually permitted the prosecution to fill up “the lacuna in its evidence recorded” thus far, after the same had already been closed, and even the accused persons had been examined under Section 313 of the Code of Criminal Procedure.

3. The purpose for which recall of PW-6 was sought for by the prosecution was to bring the weapons of offence, being the *Gandasi* as well as *Kirpan*, used in the concerned occurrence, which were allegedly recovered by the concerned witness, who happens to be the Investigating Officer of the case. The Ld. Trial Judge allowed the application by observing, *inter alia*, :-

*“The prosecution can be allowed to examine a witness which was not examined due to error or inadvertence. It would not fill up lacuna in the prosecution evidence. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case.”*

4. From the petitioners' side, a number of decisions have been cited, being “Chandran Vs. State of Kerala”, (Kerala), 1985 (2) A.I.C.L.R. 572, “Mauji Ram Vs. State of Haryana” (Punjab and Haryana), 1985 (2) R.C.R. (Criminal) 176 and “State of Haryana Vs. Ram Mehar” (S.C.), 2016 (4) R.C.R. (Criminal) 154.

5. The closest among the aforesaid decisions to the facts and

circumstances of the present case, happens to be the decision of the Kerala High Court in “Chandran Vs. State of Kerala” (supra), in which the Single Judge of the High Court had set aside a similar order for recall/re-examination of the Investigating Officer, after the prosecution evidence had already been closed. The relevant observations of the High Court are set out below:-

*“4. In this case the recovery mahazars and the case diary statements of the concerned witnesses proceeded as if the recoveries were by search or otherwise and not on the basis of information's conveyed by the accused. They are conspicuously silent in regard to the disclosure statements. Now the entire trial including examination of the investigating officer is over and the case stands posted for questioning the accused under Section 313 of the Code. What the prosecution now wants and what the Court has allowed is recalling the investigating officer to be examined again for production and proof of the disclosure statements. The fact that it was not available for being put to the investigating officer when he was examined indicates that its late production and proof will prejudice the accused in his defence.*

*5. Under Section 311 of the Code the Court is having the power to recall and re-examine any witness. But that could be only when the Court is satisfied that it is essential for the just decision of the case. Recalling and re-examining a witness like the investigating officer for production and proof of a vital record having great relevance in deciding the guilt of the accused and that too after conclusion of the evidence cannot be said to be essential for the just decision of the case. It may result in miscarriage of*

*justice.”*

6. In “**Mauji Ram Vs. State of Haryana**” (supra), a Co-ordinate Bench of this Court had set aside an order under Section 311 of the Code of Criminal Procedure, by which prosecution witness Om Singh was permitted to be recalled for re-examination and placing certain documents in evidence. It was observed, *inter alia*,:-

*“In the present case, as observed earlier, the prosecution had an opportunity of examining Om Singh PW at an earlier stage. He did not refer to any documents which are sought to be produced at this stage by the prosecution. Nor any mention was made of the aforesaid documents in his statement under Section 161 of the Code of Criminal Procedure. There was no justifiable ground for the learned trial Judge to allow the application of the Public Prosecutor at this stage. To allow the application at this stage would certainly amount to filling in the lacuna and undoing the case of the defence. I am afraid that by the mere insertion of the words in his order by the learned Sessions Judge that it was necessary for the just decision of the case to allow the application the requirement of Section 311 of the Code of Criminal Procedure is not fulfilled.”*

7. In “**State of Haryana Vs. Ram Mehar**” (supra), the Apex Court had similarly set aside the order of the High Court, which had allowed recall of certain prosecution witnesses at the instance of the defence side in a case, where Ld. Counsel for the defence had been changed, while the earlier Counsel had ostensibly omitted to put certain vital questions to the concerned witnesses. It was held, *inter alia*,:-

*“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 CrPC 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.”*

8. On the other hand, reliance of the State is on the decision of the Supreme Court in “**Zahira Habibulla H. Sheikh Vs. State of Gujarat**”, **2004 (2) R.C.R. (Criminal) 836**, wherein it was observed:-

*“Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person on the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to*

*the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this Section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.”*

9. In “**Janeshwar Dutt Vs. Sanjiv Kumar**”, **2007 (2) R.C.R. (Criminal) 628**, a Co-ordinate Bench of this Court had set aside the Ld. Trial Court's order rejecting an application for recalling of the complainant's/prosecution's witness by observing:-

*“4. I have considered the facts and circumstances of this case. A perusal of the statement of Janeshwar Dutt Annexure P-2 made in the Court at the pre- notice accusation stage and his subsequent statement Annexure P-3 read with statement of the Bank official Annexure P-4 makes it clear that it was an oversight on the part of the complainant or his counsel to get the cheque and memo proved and exhibited on the record. It is not a case where the petitioner was making an attempt to fill in the lacuna but it was merely a fallout of an oversight committed by the counsel conducting the case. The order dated June 7, 2006 (P-9) dismissing the application under Section 311 Criminal Procedure Code, if seen in context to the spirit of Section 311 Criminal Procedure Code, is not sustainable especially when the matter is still pending for the complainant's evidence.*

*5. The petition is allowed and the order dated June 6, 2006 is hereby set aside. The application under Section 311 Criminal Procedure Code filed by the petitioner deserved to be allowed. The matter is remanded back to the trial Court to again summon the complainant for the purpose of proving the cheque No.*

*741298 dated February 25, 2002 and the memo of return of the said cheque on account of insufficient funds. The said documents appear to be necessary for the just decision of the matter. The opposite party will be at liberty to cross-examine the petitioner in context to the documents exhibited by him during re-examination.”*

10. In the light of the aforesaid decisions relied upon by the contesting sides, the moot question before this Court is whether recalling of the Investigating Officer for the limited purpose of producing the alleged weapons of offence in the Court would be “essential to the just decision of the case” or would amount to granting an unfair opportunity to the prosecution to “fill up the lacuna in its evidence”.

11. In this context, it is to be noted that in the case of “**Chandran Vs. State of Kerala**” (supra), the Ld. Judge had specifically observed that in particular case, “*the recovery mahazars and the case diary statements of the concerned witnesses proceeded as if the recoveries were by search or otherwise and not on the basis of information's conveyed by the accused. They are conspicuously silent in regard to the disclosure statements*”. The implication, therefore, was that initially it was made out as if the recoveries by the Investigating Officer were effected by search or otherwise, and not on the basis of the disclosure statements of the accused.

12. In the present case, however, from the deposition of the Investigating Officer PW-6 in his examination-in-chief, it is seen that he had stated that the *Gandasi* was recovered from the house of accused Nirmal Singh, vide Memo Exhibit PJ, and that the *Kirpan* was recovered on the basis of disclosure statement of accused Kuljit Kumar under Recovery

Memo Exhibit PQ.

13. As such, the element of any wrong implication regarding the mode/manner in which the alleged recoveries were made is non-existent in the present case, which was, however, not so in the aforesaid Kerala High Court's decision.

14. On the other hand, it has been correctly observed by the Ld. Trial Judge, *“This is a case of oversight committed by the Public Prosecutor during trial and nothing new or beyond the record is essentially sought to be produced before the Court since admittedly the Recovery Memos under which the concerned weapons were seized were all part of the statutory documents submitted along with the challan under Section 173 of the Code of Criminal Procedure”*.

15. This Court is, therefore, of the opinion that by allowing the application under Section 311 of the Code of Criminal Procedure, only a just decision in the case was sought to be secured on the basis of evidence, which was all along part of the record, and correction of oversight on the part of the Public Prosecutor before conclusion of the trial could not be taken to be the same as “filling up the prosecution lacuna”.

16. In the over all facts and circumstances of the case, the decision of the Co-ordinate Bench of this Court in **“Janeshwar Dutt Vs. Sanjiv Kumar”** (supra), appears to be more applicable to the present case.

17. For the aforesaid reasons, this Court finds no justification to interfere with the impugned order passed by the Ld. Trial Court, which is, accordingly, upheld. It, however, goes without saying that after the concerned witness (PW-6) is recalled for re-examination on the limited

points mentioned in the application under Section 311 of the Code of Criminal Procedure, the defence side shall be at full liberty to cross-examine him as deemed appropriate.

18. Disposed off.

19. Further, the Ld. Trial Court shall not be influenced by any observations made in any part of this order and it shall pass its reasoned judgment after conclusion of trial independent of the same.

**25.10.2017**

Apurva

**(SUDIP AHLUWALIA)  
JUDGE**

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