

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CRM-M-452-2017

Date of decision : 03.02.2017

Beero

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.H.S. Gill, Senior Advocate
with Mr.R.K.Dhiman, Advocate
for the petitioner.

Mr.Kuldeep Tiwari, Addl.A. G. Haryana.

AMOL RATTAN SINGH, J.(ORAL)

The issue in this petition is as to whether the impugned order passed by the learned Special Judge, Kurukshetra, allowing the application of the Public Prosecutor seeking to recall and re-examine PW10, ASI Dharambir Singh, is an order which is in consonance with the purpose behind the enactment of Section 311 of Cr.P.C., or would it actually amount to filling in a lacuna in the prosecution evidence.

The aforesaid witness, i.e. PW10 ASI Dharmbir Singh, is stated to be a part of the police party headed by one ASI Daljit Singh and consisting of one Head Constable, one Constable and one lady Constable, that, as per the version of the prosecution, on secret information received at

2776, in which, as per the information received by them, 'Ganja' was being transported by the petitioner and her two co-accused. The vehicle having been stopped and the accused having been apprised of their right to get the bags, stated to have been recovered from the vehicle, searched by the police party present or before a Gazetted Officer, they opted for the search to be conducted before a Gazetted Officer, who was consequently called and thereafter, the bags are stated to have been searched and the contraband allegedly contained therein weighed and taken into custody, along with the petitioner and her co-accused.

The application moved by the Public Prosecutor under Section 311 Cr.P.C., was on account of the fact that while testifying as PW10, the aforesaid ASI Dharambir deposed that secret information was received with regard to 'Ganja' being brought by the petitioner and her co-accused from Delhi in the aforesaid vehicle, but thereafter he went on to state that after the Gazetted officer had arrived at the spot, poppy straw was found in a blue coloured bag stated to be carried by the petitioner, from which two samples of 100 grams each were separated and the remaining poppy husk, on weighment, was found to be 19 kgs and 800 grams. He further stated that thereafter, upon search of another accused, i.e. Premo, poppy husk was found in the bag stated to be carried by her.

Thus, as per this witness, though as per the secret information received by the police party, 'Ganja' was being transported by all three accused in a car, but what was actually recovered, was bags of poppy husk or poppy straw.

Mr. Gill, learned senior counsel appearing for the petitioner, submits that the witness having already deposed to the aforesaid effect on

18.07.2016 and having been cross examined also on that date, recalling him now, by filing an application about 3 weeks later, only ostensibly to try and determine as to whether the witness had stated that poppy husk or poppy straw was a slip of the tongue or he genuinely meant it to be so, would amount to filling up a lacuna, and with the ASI being a police official, he is almost certainly bound to testify in terms of what he is advised to by the public prosecutor.

Mr. Gill relies upon a judgment of the Supreme Court in *Mishrilal & others Vs. State of M.P. And others, 2005(10) SCC 701*, to submit that recalling of a witness in such circumstances cannot be permitted. In that case, one witness, PW2 Mokam Singh, had, after testifying before the Sessions Judge on 06.02.1991 and having been cross-examined on the same date, testified also before a Juvenile Court which was seized of the proceedings against those accused who were juvenile in the same occurrence. Upon an application having been moved thereafter by the Public Prosecutor in that case, and it having been allowed, with Mokam Singh recalled for re-examination, it was held by their Lordships that once the witness has been examined-in-chief and cross-examined fully, he should not have been recalled and re-examined to deny the evidence he had already given before the Court, even if he had given an inconsistent statement before any other Court or forum subsequently (reference paragraphs 5 & 6 of the judgment).

Mr. Tiwari, learned Addl. Advocate General Haryana, on the other hand has submitted that the recalling of PW10 in the present case would not amount to filling in a lacuna by the prosecution, in view of the fact that the chemical examiners' report also states that the contraband stated

to have been recovered from the petitioner and her co-accused, as was sent for examination, was actually 'Ganja' and not poppy husk or poppy straw. He further submits that other prosecution witness have also deposed to the same effect and the recovery memos prepared at the spot of the recovery also refer to the contraband allegedly recovered to be Ganja and not poppy husk or poppy straw. The statement made by PW10 ASI Dharambir under Section 161 Cr.P.C. is also stated to be to the effect that it was actually 'Ganja' and not poppy husk or poppy straw, that was recovered from the petitioner-accused.

Mr. Tiwari has referred to the judgment relied upon by the learned trial Court while passing the impugned order, i.e. *Sister Mina Lalita Baruwa vs. State of Orissa and others, (2013)16 SCC 173*, to submit that the Court cannot be a silent spectator or a non participant to the testimony of any witness and is required to step in where it is of the opinion that in the interest of justice, a witness does need to be recalled for further examination.

In that particular case, one of the witnesses examined, i.e. the Sub Divisional Magistrate before whom a test identification parade was conducted, had deposed beyond the record of the TIP, that the complainant had stated that the accused had not raped her but had only molested her.

The said inconsistency in the statement of the witness having been brought to the notice of the public prosecutor by the complainant and no application under Section 311 having been filed by him, the complainant herself filed an application for recalling of the said witness, which was dismissed by the trial Court and with eventually the matter going up the Supreme Court, it was held by their Lordships as has been observed

hereinabove, that in such a situation it is duty of the Court to actually recall the witness to try and ascertain the truth of the statement made by the witness.

Mr. Tiwari has further submitted that the recalling of the witness in the present case, i.e. PW10 ASI Dharambir, would thus not be in filling up a lacuna but only an attempt by the trial Court to determine as to whether it was a slip of tongue made by the witness, or whether he was 'sticking to his stand' of stating that it was poppy husk or poppy straw that was recovered.

Having considered the arguments of both, learned senior counsel for the petitioner and learned Addl. Advocate General, Haryana, though in one manner of speaking recalling of such a witness can be termed to be a filling up a lacuna, however, it is still obviously for the trial Court to determine as to whether what the witness had stated was a genuine slip of the tongue, or whether he is still standing by his earlier statement of what was recovered being poppy husk or poppy straw and not Ganja.

Obviously, any such determination by the trial Court on the basis of the deposition to be given by PW10, upon him being recalled for re-examination, would be fully appraised by that Court before arriving at the final conclusion as to the guilt or innocence of the petitioner and her co-accused, along with all other evidence that is before the Court.

Hence, in the aforesaid circumstances, this Court would not interfere in the impugned order.

Consequently, this petition is dismissed, with the aforesaid observations reiterated as a direction to the trial Court, to obviously keep in mind the entire evidence in its totality, including the individual testimonies

sworn by the witnesses, including the witness who is to be recalled and thereafter to come its conclusion as to whether the deposition of the said witness was simply a slip of the tongue, or whether he is improving upon his statement (in case he does depose differently to what he had earlier testified).

(AMOL RATTAN SINGH)
JUDGE

February 03, 2017.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No