

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

**CRR No.4712 of 2016 (O&M)
Date of decision: 01.03.2017**

Neeraj

.....Petitioner

Versus

State of Haryana

.....Respondent

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Sushil Jain, Advocate,
for the petitioner.

Mr. D.R. Singla, DAG, Haryana.

Ritu Bahri, J.

This petition has been filed against the order dated 06.10.2016 passed by the Additional Sessions Judge, Sonipat, whereby application filed by the petitioner (accused) under Section 311 Cr.P.C. for recalling Baru Ram (PW-5) has been dismissed.

A perusal of the impugned order shows that this application was filed by the accused-petitioner on account of the fact that a new counsel had been engaged by him. Hon'ble the Supreme Court in **AG Vs. Shiv Kumar Yadav and another**, 2015 (4) RCR (Criminal) 312 examined a case, where accused while facing a trial under Section 376 IPC had made an application for recalling of the witness on the ground of change of counsel. While deciding the issue, it was observed as under:-

have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the Court under Section 311 Cr.P.C. I am supported in my view by the observations of Hon'ble Delhi High Court in its order ***dated 20.02.2008 in case titled as Raminder Singh v. State, Criminal MC 8479/2006***, where it has been held as under:

“In the first place, it requires to be noticed that scope of Section 311 Cr.P.C. does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be pre-judging what according to it are 'material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 Cr.P.C. No judgment has been pointed out by the learned counsel for the petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial Courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.”

28. It may also be relevant to mention that Article 22 (1) of the Constitution of India confers a Fundamental Right upon an accused, who has arrested by the police to be defended by a legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of ***State of Madhya Pradesh v. Shobha Ram and others, AIR 1966 SC 1910*** wherein it has been observed as under:

“Under Article 22, a person who is arrested for whatever reason, gets three independent rights. The right is the right to be told the reasons for the arrest as soon as an arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one' own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty.

29. In the case of *State v. Mohd. Afzal & Ors. 2003 IV AD (Cr.) 205*, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in *Strickland v. Washington 466, U.S. 688 (1984)* was cited before the Delhi High Court and the learned counsel for the accused in that case had argued that the law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of *(1991) 1 SCC 286 Kishore Chand v. State of Himachal Pradesh, (1981) 1 SCC 627 Khatri & Ors. v. State of Bihar & Ors., (1980) 1 SCC 108 Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, (1983) 3 SCC 307 Rajan Dwivedi v. Union of India, (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot v. State of Maharashtra*, while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as *State v. Navjot Sandhu & Ors. AIR 2005 SC 3820*.

At this stage, reference can further be made to a decision given by Hon'ble the Supreme Court in *State of Haryana Vs. Ram Mehar & Others,* 2016 (4) RCR (Criminal) 154, where in a murder trial, all 148 witnesses had been examined and after recording of statement of the accused under Section 313 Cr.P.C., a senior Lawyer was engaged. Thereafter, an application for recalling some of the prosecution witnesses for their cross-examination was made on the ground of change of counsel. In that case, the Hon'ble Supreme Court laid down certain principles, which are as under:-

32. The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC. We think it seemly to reproduce some of them:-

“17.2. The exercise of the widest discretionary power under Section 311 Cr.PC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the

ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under Section 311 CrPC 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.

17.5. 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.

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

17.7. 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.

x x x x x x x x

17.10. Exigency of the situation, fair play and good sense should be the safeguard, 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.

17.11. 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.

x x x x x x x x

17.14. The power under Section 311 Cr.PC 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.”

been examined and the trial is about to conclude. Change of counsel cannot be a ground to recall witness Baru Ram (PW-5) for conducting his further cross-examination.

Resultantly, after going through the facts and circumstances of the case and the law laid down by Hon'ble the Supreme Court in the aforesaid authorities, no ground is made out to interfere in the impugned order.

Dismissed.

01.03.2017
ajp

(RITU BAHRI)
JUDGE

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