

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

Crl. Misc. M-13470 of 2016 (O&M)  
Date of Decision: December 19, 2018

Karamjit Singh @ Kammi

...Petitioner

Versus

State of Punjab

...Respondent

**CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR**

Present:- Mr. Preetinder Singh Ahluwalia, Advocate  
for the petitioner.

Ms. Rajni Gupta, Senior DAG Punjab.

Mr. Mohit Garg, Advocate  
for the complainant.

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**JAISHREE THAKUR, J.**

The petitioner herein seeks to challenge order dated 21.03.2016 passed by Additional Session Judge Patiala, whereby application filed by the petitioner under Section 311 of the Code of Criminal Procedure (in short 'Cr.P.C.') for recalling witness PW1 prosecutrix for further cross-examination has been dismissed.

2. In brief, the facts as stated are that, the petitioner was implicated in the FIR No.140 dated 23.07.2015 registered at Police Station Civil Lines Patiala for offences punishable under Sections 363, 366A, 376 (N), 376, 506, 34 of the Indian Penal Code and Section 4 of the Protection of Children From Sexual Offences Act, 2002 (for short 'POCSO Act'). The

case was registered on the basis of a statement made by complainant Pinky whereby she raised allegations against the petitioner in respect of raping her daughter. Pursuant to the registration of the FIR, the matter was investigated and final report under Section 173 of Cr.P.C. was submitted. The petitioner along with his brother were charge-sheeted to face trial for the aforesaid offences. The prosecutrix was examined and thereafter an application was submitted to recall the prosecutrix under section 311 Cr. P.C which application was dismissed. Aggrieved, the instant petition has been filed.

3. Mr. Preetinder Ahluwalia learned counsel appearing on behalf of the petitioner contends that the petitioner has been falsely implicated in the instant case and that to establish the same it would be necessary to recall the prosecutrix as the previous defence counsel did not confront her with relevant questions. In the application filed, recalling of the witness was sought on several grounds. It is vehemently argued that Section 311 Cr.P.C permits recalling of witness at any stage if the evidence sought to be produced would facilitate in arriving at the truth. It is also argued that negligence of the defence counsel in putting relevant documents to the witness is sufficient ground for the court below to allow the application. Reliance is placed upon judgments rendered in **Rajaram Prasad Yadav vs. State of Bihar and another, 2013(3) RCR (Criminal) 726, P. Sanjeeva Rao vs. State of A.P., 2012(3) RCR (Criminal) 653, Rajiv Sood vs. State of Punjab, 2016(1) RCR (Criminal) 67.**

4. Per contra Mr. Mohit Garg, learned counsel appearing on behalf of the complainant submits that change of counsel is not a sufficient ground to permit recalling of the witness and also that the petitioner has every

opportunity of leading his own defence and the question sought to be posed to the prosecutrix have also been answered by her in her cross-examination.

It is also submitted that the prosecutrix being a minor should not be subjected to further cross-examination as she would be forced to relive the horrific incident again. Reliance is placed upon a judgment rendered in **S.**

**Sankara Varman vs. State represented by the Inspector of Police, 2016**

**(3) MLJ (Criminal) 764.**

5. I have heard the counsel for the parties and with their assistance have perused the pleading as and the case law cited.

6. Section 311 of Cr. P.C. reads as under:-

*“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”*

Section 311 Cr.P.C. permits a person to be summoned as a witness at any stage of the trial or other proceedings. A reading of the above section would show that the first part gives discretionary authority to the court enabling it to exercise its powers at any stage of inquiry, trial or other proceedings under the Code. It can summon any person as a witness, examine any person in attendance, who may not even be summoned as witness and can recall and re-examine any person already examined. The

Court is also competent to exercise such powers *suo motu* even if no such

application has been filed. However, there are fetters on such power to recall or allow examination of a witness, being that the Court must satisfy itself that it essential to the just decision of the case.

7. The trial court, while dismissing the application, has observed as under:

*“Appreciating the contentions of the counsel for the applicant/accused as well as the Ld. Addl. Public Prosecutor for the state and having gone through the record, it transpires that prosecutrix minor Manpreet Kaur was cross examined on 23.12.2015 and sufficient opportunity of cross-examining the said witness was given to the accused. The accused is facing allegations u/s 4 of Protection of Children from Sexual Offences Act, 2012. As per Section 35 of the Protection of Children from Sexual Offences Act, which prescribes the period for recording of evidence of a child and disposal of the case; the evidence of the child shall be recorded within a period of 30 days of the special court taking cognizance of the offence and reasons for delay if any shall be recorded by the special court. Section 36 of the said Act provides in sub Section (1) that the Special court shall ensure that the child is not exposed in any way to the accused at the time of recording of evidence and ensure that the accused is in a position to hear the statement of the child and communicate with his advocate. Thus, the testimony of the minor was concluded after affording sufficient opportunities to the accused.*

*The trial is now near completion as the case is now posted for recording the statement of the accused u/s 313 Cr.P.C. The affidavit which is sought to be put up to the prosecutrix showing that no occurrence took place; has been procured after her examination-in-chief was concluded in this case. The documents i.e. FIR No.165 dt. 24.6.2015, proceedings u/s 107/151 Cr.P.C., and receipt No.10918 dt. 28.6.2015 of Rs.1100/- pertains to the alleged marriage of the prosecutrix and some enmity of the accused with one Avtar Singh regarding which questions were put to the prosecutrix in her cross-examination already conducted. Otherwise these documents can be proved through defence and they necessary need not be put to the minor witness moreover they were available when the witness/prosecutrix was cross-examined in the court and sufficient opportunity was given and change of counsel alone cannot give the accused a fresh right to recall the witness. It would be pertinent to mention here that Section*

*33 of Protection of Children from Sexual Offences Act provides in Sub Section (5) that the Special court shall ensure that the child is not called repeatedly to testify in the court. Thus since sufficient opportunity has already been granted for cross-examining the child witness, no ground for allowing the application is made out.”*

8. There are plethora of decisions, which are in favour of recalling the witnesses under Section 311 Cr.P.C., whenever it appears that it is so necessary for *proper adjudication of the case*, depending upon the facts and circumstances of each case, with a rider that the evidence appears to be essential for the said purpose. However, this power has to be exercised with great care and caution. The documentary evidence by which the petitioner seeks to confront the prosecutrix are, (i) FIR No 165 dated 26.6.2015 u/s 324 IPC, which is available on the record as Annexure P-5 which pertains to injury suffered by Avtar Singh, a relative of the prosecutrix on 23.06.2015 at the hands of petitioner, (ii) Annexure P-6, the Kalandra filed under Section 107/151 IPC against the petitioner, iii) Annexure P-7 is the report of the SSP Sangrur dated 1.8.2015 on the complaint received by the police regarding forcible marriage of the prosecutrix and investigation thereon, (iv) Annexure P-8 the affidavit executed by the prosecutrix stating no wrong had been committed by the petitioner-accused and that the statement given by her alleging rape was given under pressure and lastly (v) with the receipt No. 10918 dated 28/06/2015 of the Gurudwara where her marriage was solemnized.

9. In this case, the prosecutrix was examined by the trial court on 23.12.2015 whereas, the FIR No.165 was recorded on 24.06.2015 and the

kalandra was recorded by the police on 29.06.2015 in which one Avtar Singh is the complainant. Similarly, the report of the SSP, Sangrur is dated 01.08.2015 and the receipt of the Gurudwara is dated 28.06.2015. Thus, all these documents were within the knowledge of the petitioner herein, while cross-examining the prosecutrix. So far as the affidavit executed by the prosecutrix is concerned, the same is dated 04.02.2016 i.e. later to the examination of the prosecutrix before the trial court on 23.12.2015. The receipt of the Gurudwara showing marriage was solemnized, was also in his knowledge. A perusal of the application moved before the trial under Section 311 Cr.P.C. shows that the sole ground taken for recalling the witness is that the previous counsel could not cross-examine the witness qua the aforesaid documents (except the alleged affidavit furnish by the prosecutrix) whereas, the cross-examination of the prosecutrix shows that questions regarding Avtar Singh as well as performing her marriage forcibly were put to her by the defence counsel. So far as argument raised regarding (in) competency of previous counsel in cross-examining the prosecutrix or change of counsel is concerned, in ***State of Haryana Vs Ram Mehar and Others, 2016(4) R.C.R (Criminal) 154***, it has been held that mere change in counsel would not bring the applicant/accused case within the purview of Section 311 Cr.P.C. In the case of ***State (NCT of Delhi) vs. Shiv Kumar Yadav, (2016) 2 Supreme Court Cases 402***, the Apex Court has held that recalling of witness cannot be allowed on a plea that the defence counsel (previous) was not competent and had not effectively cross-examined the witnesses. Under these circumstances, it cannot be said that these documents are necessary for the just decision of the case.

10. Even the case laws relied upon by learned counsel for the petitioner are not applicable to the facts and circumstances of the present case. In the case of **Rajaram Prasad Yadav vs. State of Bihar and another (supra)** an application under Section 311 Cr.P.C. was moved by the witness for his re-examination by alleging that on an earlier occasion he had turned hostile as coercion and threat was meted out to him, but the said application was dismissed by the trial court and the said order was subsequently affirmed by the Apex Court. In the case of **P. Sanjeeva Rao vs. State of A.P. (supra)**, the application moved under Section 311 Cr.P.C. for cross-examination of the witnesses PW1 and PW2 was dismissed by the trial court and this order was affirmed in appeal by the High Court. However, the Apex Court allowed the application, while considering the fact that cross-examination of both these witnesses was recorded as “nil” due to the error committed by the lawyer. In the case of **Rajiv Sood vs. State of Punjab (supra)** the case pertains to offence under the Narcotic Drugs and Psychotropic Substances Act, 1985, which contains stringent provisions. The application moved by the accused therein under Section 311 Cr.P.C. for recalling PW5 Inspector for his further cross-examination was dismissed by the trial court, whereas the High Court allowed the application while taking note of the fact that the trial court did not appreciate the true facts of the case as well as object and true import of Section 311 Cr.P.C. whereas in the case in hand, it is not so. As such, case law as cited are not applicable to the facts and circumstances of the present case.

9. The petitioner herein has been charged *inter alia* with the offences Section 376 IPC and Section 4 of POCSO Act with the allegation

of committing the rape of the minor prosecutrix. In case, he wants to produce these documents on the record in support of his defence, he can do so. Most of them are official/semi-official documents (other than the affidavit). Moreover, Section 33(5) of the POCSO Act mandates *that the Special Court shall ensure that the child is not called repeatedly to testify in the Court.* Under these circumstances, this court has no hesitation in holding that the trial court has rightly dismissed the application. There is no infirmity in the order of the court below to warrant interference.

10. In view of the above, the petition in hand is hereby dismissed, being devoid of any merits.

**December 19, 2018**  
*vijay saini*

**(JAISHREE THAKUR)**  
**JUDGE**

Whether speaking/reasoned  
Whether reportable

Yes/No  
Yes/No