

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

Crl. Misc. M- 35197 of 2018 (O&M)
Date of Decision: November 15, 2018

Akash Verma and another

...Petitioners

Versus

State of Haryana and other

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. R.S. Cheema, Senior Advocate with
Mr. Satish Sharma, Advocate,
for the petitioners.

Mr. P.P. Chahar, DAG, Haryana.

Mr. A.P.S. Deol, Senior Advocate with
Mr. R.V.S. Chugh, Advocate and
Mr. Daanish Singh Sukarchokia, Advocate,
for respondent No.2.

Mr. Hemant Bassi, Advocate,
for respondent No.3.

JAISHREE THAKUR, J.

1. Challenge in the instant petition is to the order dated 7.8.2018 passed by the Special Court-cum-Additional Sessions Judge, Fatehabad, vide which the application filed by the complainant under Section 311 of the Code of Criminal Procedure (for short “**the Code**”) for her re-examination as well as her parents has been allowed.

2. The facts in brief as per the FIR, are that the complainant

alleged that on 28.4.2017 at 3/3.30 p.m. in response to a call given by Akash Verma with whom she had a friendship, she reached Mirchi Hotel, Tohana at 3 p.m. There she met Akash Verma and they started talking to each other. Akash closed the door of the room and against her wishes forcibly committed rape on her. Thereafter, Ashish Kumar came there and also started to sexually assault her. As she started crying, Akash covered her mouth with his hand and Ashish Kumar forcibly raped her. After sometime, Gaurav Kapoor entered the room and he too raped her. Three of them threatened to kill her in case she screams or informs anyone about this incident. Therefore, out of fear she did not tell anyone about the said incident. It is further alleged that on 29.4.2017, the complainant told the entire episode to her parents and this is how the present FIR came to be registered against the aforesaid three accused.

3. On the registration of the FIR, the complainant was medically examined on 30.4.2017 and on that very day, the complainant got her statement recorded before the Sub Divisional Judicial Magistrate, Tohana under Section 164 of the Code reiterating the allegations of rape committed by the accused. On 2.5.2017, all three accused persons were arrested. After completion of the investigation, on 12.7.2017, final report under Section 173 of the Code was presented and after framing of the charges, the accused were put on trial. On 24.1.2018, the complainant and her parents were examined as PW-1, PW-2 and PW-3 respectively but none of them supported the prosecution versions. Consequently, they were declared hostile and were cross-examined by the Public Prosecutor.

4. On 27.3.2018, the complainant filed an application under Section 311 of the Code claiming that she had turned hostile while deposing in the court, on account of a compromise entered into with family members of accused Ashish Kumar, wherein his parents agreed to get the complainant married to Ashish Kumar on his release from the jail. However, now they have not honored the said compromise and as such, the complainant sought the permission of the trial court to re-examine her and her parents. The trial court by order allowed the application, which is being impugned in the instant petition.

5. Mr. R.S. Cheema, learned Senior Counsel, assisted by Mr. Satish Sharma, Advocate, appearing for the petitioners, submits that the impugned order passed by the trial court is not sustainable as the complainant has not been able to establish that any undue influence or pressure was exercised by the petitioners upon her or her parents at the time of giving their statements in the Court. In fact, none of the accused is a party to the compromise alleged to have been executed on 18.1.2018. It is further submitted that it is well settled principle of law that power under Section 311 of the Code 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, however, the trial court has allowed the application so moved by the complainant for re-examination of herself as well as her parents in the absence of any cogent and substantial evidence brought on record. It is also contended that the trial court has allowed the application primarily relying on the alleged compromise entered into

between the parents of the prosecutrix and Ashish Kumar—respondent No.3. It is submitted that the complainant's sole grievance is that since the terms of the compromise have not been honoured, therefore, she should be allowed to depose again. By accepting this ground, the trial court has recorded legal sanctity to the compromise, which is not only a failure of justice, but also sets a dangerous precedent for the future as all the witnesses would then undermine the sanctity of judicial process by indulging in such illegal ventures with impunity and then take recourse to the judicial process as per their whims and fancies. It is further submitted that the application under Section 311 of the Code cannot be allowed merely for filling up the lacunas left by the prosecution. It is further submitted that the petitioners are not party to the compromise and therefore, failure thereto cannot be attributed to them. It is submitted that a careful perusal of the documents, be it FIR, Medico Legal examination report or statement under Section 164 of the Code, no offence under Section 376 (D) IPC is at all made out, particularly when there is a material contradiction in the statements of the complainant. It was alleged that the complainant had gone to the hotel on the asking of petitioner No.1—Akash Verma, whereas, while deposing in the Court, she stated on oath that she had gone to hotel to meet Ashish Dhingra, her fiancée. It is also argued that at the time the prosecutrix and her family members resided in Court, they had not mentioned about any compromise having been arrived at. It is also contended that since 376 (D) IPC is triable by the Sessions Court and as per Section 225 of the Code, the trial can be conducted only by a Public Prosecutor, therefore, the present application

moved by the complainant in her personal capacity is not maintainable. Reliance in this regard has been placed on **Shiv Kumar Vs. Hukam Chand and others (1999) 7 SCC 467**.

6. Mr. Hemant Bassi, Advocate, appearing on behalf of respondent No.3, who is the third accused, supported the arguments as raised on behalf of the petitioners.

7. Mr. A.P.S. Deol, Senior Advocate, assisted by Mr. R.V.S. Chugh and Mr. Danish Singh Sukarchokia, Advocates, appearing on behalf of respondent No.2—complainant, while supporting the impugned order, submits that the trial court has rightly allowed the application so moved by the complainant. It is contended that under Section 311 of the Code the courts have wide discretion to recall any witness for re-examination any time prior to pronouncement of judgment, if it appears to the Court that such re-examination is essential for the just decision of the case. In the present case, the complainant as well as her parents resiled from their statements because as per the compromise arrived at, the parents of Ashish Kumar had agreed to marry their son with the complainant. However, since the parents of Ashish Kumar did not fulfill their part of the obligation under the compromise, therefore, the complainant had no other option but to approach the court for her, as well as her parents' re-examination. It is submitted that Section 311 of the Code does not put any limitation on the court in re-examining a witness, in case re-examination of a witness goes to the root of the case. It is also submitted that the complainant has a fundamental right to have a fair trial and her fate cannot be sealed only on the whims of the

accused, who first sexually assaulted her, and subsequently entered into a compromise with the parents of the complainant with the ulterior motive of escaping the trial and possible conviction, and eventually even refused to honour the compromise so entered between them after statement was suffered in court. In such circumstances, the trial court has rightly allowed the application filed by the complainant under Section 311 of the Code and as such the present petition deserves to be dismissed. It is also argued that the courts are to see that justice is done between the parties and in case an application is filed by a person other than the Public Prosecutor, the same cannot be brushed aside on technicalities. In support of his contentions, reliance has been placed on **Mannan Sk. Versus State of West Bengal and another 2014 (4) R.C.R. (Criminal) 617**, and **Khatta Singh Versus C.B.I. Chandigarh and others 2018 (3) RCR (Criminal) 708**. In **Khatta Singh's case (supra)**, an application filed under Section 311 of the Code filed the witness was allowed by his Court, while referring to the case **Khushwinder Singh and others Vs. State of Punjab 2007 (1) RCR (Crl.) 531**, in which case also, earlier the witnesses turned hostile in the court and after one of accused giving threat had died, the application under Section 311 of the Code was filed for re-examination and it was allowed.

8. Mr P.P. Chahar DAG learned counsel appearing on behalf of the respondent state supports the contentions as set out by Mr. A.P.S. Deol learned Senior Counsel, while also submitting the Public Prosecutor was present during the hearing of the application and did not oppose the same, therefore, it can safely be taken that there was deemed acceptance of the

application. He also places reliance of judgment rendered in **Sheikh Madinabibi Mustafabhai Versus state of Gujarat Criminal Revision Application No 94, 142 of 2004 decided on 12.10.2004** in support of his arguments.

9. I have heard the counsel for the parties and with their assistance have gone through the pleadings of the case and case law as relied upon.

10. From the arguments that have been addressed, two questions would arise for determination. Firstly, has the power under Section 311 of the Code been rightly exercised to recall the witnesses, given the fact that prosecutrix and her parents had themselves resiled in court and turned hostile? Secondly, would the application be maintainable in its present form as Section 225 of the Code clearly states that a trial is to be conducted before the Court of Session by the Public Prosecutor? In the instant case the application under section 311 of the Code has been instituted at the behest of the prosecutrix.

11. To understand the wide amplitude of powers that have been conferred upon the trial court Section 311 of the Code has to be read:

"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."

The touchstone for exercise of powers under Section 311 of the Code, is the satisfaction of the Court that the evidence of any person, which comes to its notice, is essential for the just decision of the case. This power, under Section 311 of the Code, can be exercised by the court ***at any stage of any inquiry, trial or other proceedings under the Code***, to summon any person as witness, examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined. The intention of the Legislature is to empower and enable the court to come to a correct finding and for that reason, the court would be fully justified in permitting production of evidence, whether documentary or oral, where the court feels that the same is necessary for the just decision of the case. No fetters can be put in exercise of these powers of the court. The cause of justice is paramount and no impediment has, therefore, been intentionally put on the court by the Legislature to exercise the powers under Section 311 of the Code. Furthermore, in **Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors 2004 (2) RCR (Crl.) 836**, the Supreme Court described the scope of [Section 311](#) of the Code as under:-

“Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of [Section 311](#) but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

12.

An argument has been by Mr. R.S. Cheema, Senior Counsel

appearing on behalf of the petitioners, that there was no threat or coercion at the time the statement was given in the Court and since no case was made out, the prosecutrix and her parents rightly resiled from their statements given under Section 164 of the Code and they did not support the prosecution. It is argued that in case the application under section 311 of the Code is allowed, it would encourage persons to back out from statements recorded and make a mockery of the trial. This argument is without any merit. If a compromise was entered into as set up by the complainant, it can be said that it was an *allurement* to have the criminal prosecution dropped against the accused. This can be deduced from the reading of the compromise which has been placed on the record, where it is stated that both parties would make an effort to get Ashish Kumar released from the custody. This compromise was effected by the parents of Ashish Kumar and the prosecutrix. Without going into the question whether the compromise was in violation of the law or not, it would not be out of place to mention that parents in our Indian social structure would make all endeavor to restore the reputation of their daughters in society by arranging her marriage with the same person accused of such offence. In fact, if the terms of the compromise had been adhered to, the petitioners would have benefitted as well, since they were to be released from custody and the prosecutrix and family members would not have instituted the instant application seeking re-examination.

13. In para 41 of judgment rendered in **Zahira Habibulla H Sheikh's case (supra)**, it has been held:

*"Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, **either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of***

rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals- terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.”(

emphasis supplied). It was further held that. “It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.”

14. In the ultimate analysis, it is a duty cast upon a court to arrive at

the truth and ensure that justice prevails. An application under section 311 of the Code may be allowed at any stage of trial, if the courts are of the opinion that examination of any such person appears to it to be essential to the just decision of the case. In the present case, it appears that father of Ashish Kumar (one of the accused) entered into a compromise that a marriage would take place between the prosecutrix and his son and all efforts would be made to secure his release from custody. On account of the compromise, the prosecutrix and family members resiled, the bail of the said accused was allowed and also the marriage date between the prosecutrix and the said accused was settled in terms of the compromise. All arrangements were made, however the accused did not turn up for the wedding and left the prosecutrix in a lurch, which precipitated the filing of the application under section 311 of the Code. *Prima facie*, it appears the witnesses resiled on account of the allurements of marriage and a chance of a blemish free life for the prosecutrix and, therefore, it can safely be said that the statement given in court denying that the offence of rape was committed, was not a statement given freely or without any fear.

15. The second question posed is, whether the application is maintainable in its present form since it has been filed by the complainant instead of the Public Prosecutor as Section 225 of the Code clearly states that a trial is to be conducted before the Court of Session by the Public Prosecutor?

16. Section 225 Cr.P.C. reads as under :

“225. Trial to be conducted by Public Prosecutor. In every trial before a Court of Session, the prosecution shall be conducted

by a Public Prosecutor.”

Mr. R.S. Cheema, Senior Counsel submits that there is no vested right with the complainant or aggrieved party, to directly conduct prosecution. It is argued that Section 225 of the Code specifies that every trial conducted before the Courts of Session is to be conducted by the Public Prosecutor only, whereas while conducting trials before a Magistrate, sub-section (2) of Section 301 of the Code permits a private person to instruct the pleader to prosecute any person in court, even then the prosecution still has to be conducted by the Public Prosecutor or the Assistant Public Prosecutor and the private pleader as engaged by the private person has to act under the directions of the Public Prosecutor. Even written arguments, which mainly submitted after closure of evidence, are to be submitted with the permission of the court. It is argued that in the instant case, the matter was being tried before the Courts of Session and the application preferred by the complainant through a private pleader counsel is not sustainable as the same had to be filed by the Public Prosecutor himself. Reliance in this regard has been placed upon **Sundeep Kumar Bafna vs State of Maharashtra and another (2014) 16 Supreme Court Cases 623**, wherein it has been held that it is a Public Prosecutor who must at all times remain in control of the prosecution and the counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. Reliance has also been placed on the judgment rendered in **Shiv Kumar Versus Hukam Chand and others (1999) 7 SCC 467**, wherein it was explained that the Public Prosecutor would have no vested interest in the case. *But ‘a private counsel*

if allowed a free hand to conduct prosecution would focus on bringing the case to conviction, even if it is not a fit case to be so convicted. That is the reason why Parliament applied bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor’.

(Emphasis supplied).

17. Per contra, learned counsel for the complainant/prosecutrix relies on judgments rendered in **Khushwinder Singh and another vs. State of Punjab**, 2007 (1) RCR (Criminal) 531 and **Khatta Singh vs C.B.I. Chandigarh and others** 2018 (3) RCR (Criminal) 708, to submit that in similar circumstance the courts had allowed the prosecution witness to be re-examined after the witnesses turned hostile in Court and did not support the prosecution, on account of a threat being issued by the accused. Reliance was placed on another case of **Khushwinder Singh and another (supra)**, which in turn had relied upon a judgment rendered by the Supreme Court in **Zahira Habibulla H. Sheikh (supra)**, wherein it had observed that the courts should not be bound down with technicalities and decide the case on the basis of the evidence available with it. It is submitted that even by way of amendment in the Code of Criminal Procedure, an aggrieved party other than the State has been permitted to file an appeal against the acquittal of the accused. On the same analogy, if the complainant has filed an application under Section 311 of the Code, seeking recall or re-examination of a witness on the ground that the earlier statement was given on the ground of 'allurement' and the said application is not opposed by the State, technicality should be allowed to stand in the way of eliciting the truth and

fair trial.

18. Mr. P.P. Chahar, learned counsel appearing on behalf of the respondent state, while supporting the argument as addressed by the counsel for the complainant, also argues that there is deemed acceptance by the Public Prosecutor of the application so filed seeking recall of the witnesses so examined. It is submitted that even though it is a Public Prosecutor who has to conduct a trial before the Courts of Session a strict application of the section should not be applied in the **instant case** as the Public Prosecutor made every effort to elicit the truth in the cross-examination at the time the prosecutrix and her parents turned hostile. Even when an application under Section 311 of the Code was preferred, the Public Prosecutor who was present at all times did not oppose the said application on the ground of maintainability. In fact, by this conduct it could be deemed that the application by the complainant was filed with the approval of the Public Prosecutor. Reliance has also been placed on judgments rendered in **Khushwinder Singh, Khatta Singh and Zahira Habibulla H. Sheikh's cases (supra)**, in support of his arguments made. Further reliance has been placed upon judgments rendered in **Mannan Sk. and others Versus State of West Bengal and another 2014 (13) SCC 59**, in which matter also witness was recalled and re-examined after 22 years of incident, holding that justice must not be allowed to suffer because of the oversight of the prosecution. Even in the judgment rendered by the High Court of Gujarat in **Sheikh Madinabibi Mustafabhai Versus state of Gujarat Criminal Revision Application No 94, 142 of 2004 decided on 12.10.2004** where

the High Court in very similar circumstances allowed the application filed by the complainant being conscious of the fact that an application under Section 311 of the Code had not been filed by the Public Prosecutor. The High Court on the question of maintainability of an application filed by a private person and taking note of the provisions under Criminal Procedure Code that it is only a Public Prosecutor who can conduct a trial, held that ;-

*“11. It is true that in a case instituted on a police report, a victim and/or original complainant have no substantive right to address the Court or to participate in the proceedings as prosecutor, but it has been held by the Apex Court in the case of **Thakur Ram v. State of Bihar**, reported in AIR 1966 SC 911, that a private party can prefer an application seeking appropriate relief and such application can sustain if the private party is able to satisfy the Court that it is necessary to prevent substance and miscarriage of justice.”*

19. An onerous duty that has been cast upon the courts is to ensure fair trial and to arrive at the truth. All the judgments as cited above, clearly delineate that there is no limit on discretion of court to recall and re-examined witness, even if the witness who deposed one way before the court now wants to depose and is prepared to give evidence which is clearly different from what had been stated earlier. Allowing witnesses to be recalled would be in consonance with the cardinal principle that the truth must prevail. To ensure fair trial, the court can consider the request and allow such witness to be called for re-examination. The second part of

Section 311 of the Code also clearly states that the Court '**shall**' summon and examine or recall and re-examine any such person if his evidence appears to it to be essential for the just decision of the case. The court has to be satisfied that such application is not a frivolous or vexatious application, only to delay the trial or fill up any lacunas in the trial.

20. As far as the question regarding the maintainability of the application filed by the complainant is concerned, Section 225 of the Code clearly specifies that it is the Public Prosecutor who is to conduct the trial Court of Session. However, in given facts and circumstances of the instant case, when the Public Prosecutor himself continued to cross examine the witnesses even after they had turned hostile and did not support the statement given under Section 164 of the Code in order to elicit the truth; and also did not raise any objection to application under Section 311 of the Code as filed by the complainant itself raising the question of maintainability, it can be safely assumed that the said application had the concurrence of the Public Prosecutor. Even in the court today the State counsel submits that in order to arrive at the truth and to ensure a fair trial, he has no objection to the application being allowed.

21. Once the court is of the opinion that to ensure fair trial, an application is to be allowed in order to elicit the truth, then it should not be bound down by technicalities. The accused in the instant case will have all opportunities to cross-examine the complainant and her parents. In the peculiar circumstances of the instant case, setting aside the impugned order and remanding the case back to the Sessions Court, to over come this

technicality for the Public Prosecutor to file an application under Section 311 of the Code, would not serve any fruitful purpose and would rather only delay the proceedings. This is particularly in view of the statement given that there was deemed acceptance of the Public Prosecutor to the application filed. A note is also taken of the fact that the Public Prosecutor did not challenge the impugned order. As has been held in **Khushwinder Singh, Khatta Singh and Zahira Habibulla H. Sheikh's cases (supra)** technicalities should not stand in the way of determining the truth, nor should an attempt to thwart a fair trial be countenanced.

22. Therefore, this Court finds no infirmity or illegality in the impugned order passed by the Special Court-cum-Additional Sessions Judge, Fatehabad. The present petition stands dismissed.

November 15, 2018
prem

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes