

Sr. No.211

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-36775-2015(O&M)

Date of decision:30.07.2018

Kuldeep Singh

.....Petitioner

versus

State of Haryana

.....Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Deepinder Singh, Advocate
for the petitioner.

Mr. Surinder Singh, AAG, Haryana.

Mr. Gautam Dutt, Advocate
for the complainant.

Rajbir Sehrawat, J(Oral)

This petition has been filed for challenging the Order dated 13.10.2015(Annexure P-16) passed by the learned Additional Sessions Judge, Sonapat; whereby the application of the petitioner/accused for examining Ballistic Expert (Dr.R.K.Koshal, Assistant Director Ballistic, FSL, Madhuban) of FSL, Madhuban; as a witness in evidence in FIR No.310 dated 12.12.2007 under Section 302 IPC (ultimately report under Section 173 Cr.P.C filed under Sections 304,307,148,149,452,34 IPC), registered at Police Station Civil Lines, Sonapat, has been rejected.

The brief facts which form the basis of the present litigation are that a complaint was made to the Police that one boy namely, Rajesh son of Kuldeep-the present petitioner, was studying in class XII and used to go to attend coaching classed at Model Town, Sonapat. On 12.12.2007 Rajesh had not come back to home at usual timing. Thereafter, at about 5:00 pm

telephonic call was received by his mother, namely, Sunita, informing her that Rajesh was being beaten up by some persons at Sai Market, Model Town, Sonapat. Sunita called her brother, Veer Sen on telephone. Veer Sen came to house and took along him another Rajesh son of Vijay Singh. Both of them went to the spot, which was stated as a place where the said Rajesh son of Kuldeep was being beaten. There Veer Sen and Rajesh son of Vijay Singh came to know about the persons who had given beating to Rajesh son of Kuldeep. Therefore, when the assailants who had given beating to the Rajesh son of Kuldeep came face to face to the above said Veer Sen and Rajesh son of Vijay Singh then one person; named, Parveen took out his revolver/pistol and aimed at them. Another person amongst the accused ran into House No. 251-A and brought out baseball bat and sticks. The above said Parveen and other persons started giving beating to Veer Sen and in his companion Rajesh. They also smashed their car with bats and bricks. In the mean-time, father of Rajesh, namely, Kuldeep(the present petitioner) arrived at the place of occurrence in his car driven by his driver Lokender Singh @ Lokesh. When he saw the Veer Sen and Rajesh being beaten by the accused, the petitioner shouted at them exhorting them to stop beating the said two persons. At this moment, Kuldeep was hit from behind with a bat on his head by the accused Anil. Due to this Kuldeep fell down and his licensed pistol also fell on the ground. The pistol belonging to Kuldeep was picked up by Anil and he used the pistol and fired a shot at the back of right thigh of Kuldeep, who at that time was lying on the ground. Thereafter, the accused Anil and Parveen, who was also carrying another revolver/pistol as mentioned above, started indiscriminate firing at Kuldeep, Veer Sen and their companion Rajesh. In the process, Veer Sen was shot in his chest, stomach

chin. Subsequently these three persons were shifted to hospital. As per the allegation, these persons were not fit to make the statements, therefore, the Police Officer, namely, SHO Rajesh Saini came to the hospital and he obtained their signatures on some papers including some blank papers. Pursuant to that the petitioner and the other injured persons were expecting an FIR being registered on their complaint. However, they were not being informed of any action taken on the complaint. Nobody was arrested. Therefore, the representations were made by the side of the petitioner to IG and DGP, Haryana on 17.12.2007, 04.01.2008 and 10.01.2008. However, still nobody was arrested. In the mean-time, the injured Veer Sen had succumbed to the injuries.

The petitioners came to know that the FIR has been registered regarding the incident on the statement of other side and in that incident, it is the petitioner and his companion only who were made the accused. In the FIR matter, the case prepared by the Investigating Officer is that while the petitioner, Kuldeep Singh was hit on head and he was falling down, he caused fire from his pistol and those fire shots injured Veer Sen and others, resulting into injury to all the injured and the deceased. Not feeling satisfied with the role of the police and the investigation, the petitioner's side also filed a Criminal Complaint against the above said Parveen and Anil etc. Trials of both the cases are going on.

During the Investigation, the Police is stated to have recovered only one pistol of .450 bore. Therefore, it was sent to FSL along with the recovered bullets and other materials. The Report of the FSL was placed on record as Ex:PX/2 which was tendered by the public prosecutor. This report contained the information that the FSL received one pistol of .450 bore and

also speaks of one 7.65 mm fired bullet and one lead piece; which suggested that there was also another fire arm and that the other side was having another revolver/pistol also, with which the injuries could have been caused to the side of the petitioner. However, as observed above, the Police recovered only one pistol and based its case only on firing of all the shots from that single pistol, stated to be the licensed revolver of the petitioner.

During the prosecution evidence, Doctor was examined. However, in the cross-examination, the Doctor stated that regarding the exact nature of the injuries, whether these could be caused by same pistol revolver or would be caused by two different weapons can be given only by the Ballistic Expert. Accordingly, the application was filed by the petitioner for summoning of Dr. R.K.Koshal, Ballistic Expert, Madhuban, who had prepared the FSL Report, Ex:PX/2. That application was dismissed by the Trial Court vide impugned order. Hence, the present revision petition has been filed for challenging the same.

Arguing his case, learned counsel for the petitioner has submitted that the Trial Court has totally misconceived the controversy and has treated it as if the witness was being called/recalled under Section 311 Cr.P.C. for some general purposes of examination. In fact the relevant provision for summoning of the expert who has submitted the report, which is being used as an evidence is Section 293(2) Cr.P.C. It is further contended that admittedly, the different injured have got injuries of different sizes. The information as contained in the FSL report also speaks of availability of a revolver/pistol of different caliber than the one attributed to the petitioner. The Doctor has already opined that the factum; whether these injuries would be caused by different fire arms is to be clarified by the Ballistic Expert; who

FSL report is self-explanatory. It is further contended by the counsel that although the report talks of one fired bullet of a pistol of 7.65 mm caliber, however, no opinion has been expressed regarding this fired bullet in the said report. Hence it is contended that the examination of Ballistic Expert is essential so as to find out the nature and possibility of causing of different sizes of injuries by separate fire arms used in the present case, to connect the particular injuries to a fire arm of particular caliber used in the present case and even to connect the injuries to a fire arm, even if the same happened to be one, with which the injuries have been caused.

On the other hand, reply was filed by the Deputy Superintendent of Police, Sonapat on behalf of the State of Haryana, in which it is alleged that the mention of recovery of different kind of bullet from the place of occurrence, as is mentioned in the FSL, is irrelevant because no weapon of different caliber has been recovered by the Police. The Expert has already given his opinion. It is further pleaded that the case has gone to the stage of defence witness and accused has examined one defence witness as well. Therefore, it won't be appropriate to call the Expert at this stage. Learned State counsel has buttressed the pleading in the reply in his argument and has prayed for dismissal of the present petition.

Having heard the learned counsel for the parties, this Court finds that the argument raised by the learned counsel for the petitioner merits acceptance. Admittedly, it is a case of version and cross-version. The petitioner has alleged that after he fell down, his revolver was picked up by Anil and he caused injuries. It is further claimed that Parveen was already having another fire arm. Therefore, both of them caused indiscriminate firings after the petitioner had fallen down. On the other hand, Police has

.450 caliber, which was possessed by the petitioner himself and while falling down after getting head injury, the fire made by him hit the deceased. Therefore, the entire story of the prosecution in the FIR case is based on factum of all the injuries having been caused by one fire arm only. The case of the prosecution in FIR has ruled out the presence of other fire-arm. On the other hand, the injuries sustained by different injured persons, including the deceased, are of all together different sizes. The injuries in number also exceeds the number of shots which are stated to have been fired from the recovered revolver of .450caliber. On the contrary, the FSL Report mentions the presence of a bullet of a different caliber than the .450caliber, which is stated by the Police to be exclusively used in the incident. In that situation, the petitioner-side; as an accused in the FIR case, has every right to defend themselves by contradicting the story of the prosecution, with reference to the expert report; which has been relied upon by the prosecution itself. If the possible testimony of the expert; sought to be called as a witness; shows that injuries could match to the caliber of the other fire arm; of which the bullet has been found at the place; and which has been confirmed by the report Ex:PX/2, then the entire case of the prosecution shall fall flat. Still further, since it is the case of the prosecution that while falling down; the shot fired by the petitioner had hit the deceased and other injured, therefore, it shall also be clarified only by the Ballistic Expert as to whether the injuries received by the deceased and the injured could be caused from the range at which the petitioner is stated to have fallen down and from an angle which could result from falling down of a person. If the range, angle and place of injury caused to the deceased, as clarified by Ballistic Expert; do not match with the story made by the prosecution, then, again the case of the prosecution can be exposed. In both the situations, the story put forward by

the present petitioner in the cross-complaint would be substantiated to this extent. Hence it is of immense importance that the Ballistic Expert is called as a witness in this case. Calling the witness would fully meet the ends of justice so as to provide effective opportunity to the petitioner to defend himself in the FIR case against him.

Although the prosecution in the FIR case is initiated and conducted at the instance of the Police and Prosecution, however, there is a cross-version in the form of the complaint case. Although the complainant in the complaint case may not be having any right to get his version investigated from the Police as a matter of right, there is no reason as to why he should be denied even the basic state facilities to facilitate him to prove the offence against the accused in the complaint. After all, the offences involved in the complaint case are equally the offences against the society; as are the offences involved in the FIR cases. Therefore, the bare minimum which a complainant in complaint case can not be denied is; the assistance of a witness who is likely to assist him in substantiating his version. Since the criminal jurisdiction is not a private litigation, therefore, the doors of the State help can not be shut upon the complainant simply because he has chosen to or forced to file a complaint case; instead of the same being an FIR case.

On the bare perusal of the Order of the Trial Court, it is clear that the Trial Court has dealt with this case as if it is the case of ordinary witness being called or recalled by the Court. Therefore, the Trial Court has taken it and has discussed the matter as if it is a case of summoning the witness under Section 311 Cr.P.C. In the present case, it is not so. Since the petitioner is calling the government expert who has given the Report

Section 293(2) Cr.P.C. Although, Section 293(1) Cr.P.C prescribes that any document purported to be a report by the Government expert may be used as evidence in inquiry or trial or other proceedings under the Code, however, sub-section (2) of this Section makes a specific provision that Court may, if it thinks fit, summon and examine any such expert; as to the subject matter of his report. Therefore, this Section gives ample discretion to the Court to summon an expert as a witness. Like any other discretion this discretion is also to be exercised by the Court keeping in view the established judicial principles; as well as keeping in view the interest of justice. In a case where the examination of such an expert can have the drastic effect of demolishing the entire case of the prosecution itself, then it can not be said that the accused would be unjustified in making a prayer for summoning of such an expert as witness to depose regarding the report submitted by him. Therefore, it would be entirely in the interest of justice that the accused, in the present case, who is trying to re-claim a situation where he is being converted into an alleged accused from being an alleged complainant, is given an opportunity to examine the above said expert. The Report Ex:PX/2, from the point of view of the accused/petitioner, is definitely having certain information/report upon which the accused/present petitioner can seek to clarify a lot regarding the case.

Otherwise also, since the prosecution is using this document, by treating the present petitioner as an accused, and seeks the conviction of the petitioner on the basis of this document, therefore, the petitioner has every right to get any clarification qua any part of the record by examination cross-examination of the concerned witness. After all no document can be relied upon against an accused unless the accused is given an opportunity to test the veracity and the contents of that document, through the legal means.

Obviously, the prayer for calling of the witness is only a legal mean to avail this right. The reasoning given by the Trial Court for not summoning the said witness is not justified. Hence the Order of the Trial Court is liable to be set aside.

In view of the above, the present petition is allowed. Therefore, it is directed that the Trial Court shall summon the witness as prayed for. The petitioner shall be granted maximum of two effective opportunities to examine/cross-examine the said witness. It is further directed that since most of the evidence is already complete and the trial in the matter is pending since long, therefore, after the date the abovesaid witness is examined before the Court, the Trial Court shall complete the present trial within two months thereafter.

30th July, 2018

Shivani Kaushik/sv

[RAJBIR SEHRAWAT]

JUDGE

Whether speaking/reasoned *Yes/No*

Whether Reportable *Yes/No*