

Crl. Misc. No.M-44320 of 2018 (O&M)

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

**Crl. Misc. No.M-44320 of 2018 (O&M)
Date of decision : 15.11.2018**

Sandeep

...Petitioner(s)

Versus

State of Haryana and others

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Abhinav Sood, Advocate
for the petitioner.

Mr. Arun Kumar, AAG, Haryana.

Mr. Nikhil Partap Singh, Advocate
for respondent no.2.

Mr. J.S. Hooda, Advocate
for respondent no.4.

ANITA CHAUDHRY, J.

The petitioner challenges the order dated 06.09.2018 passed by the Additional Sessions Judge, Palwal who dismissed the application under Section 311 Cr.P.C. filed by the complainant on 06.09.2018.

It is necessary to advert to the details given in the FIR. The petitioner is the cousin of the prosecutrix. He lodged the FIR and it was disclosed that his uncle's (Fufa) daughter was being harassed by Sehjad of village Bedha for the past several days, therefore, his uncle asked him to take the prosecutrix to his village as they wanted to save the honour of their daughter. The prosecutrix started residing with the family of the

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complainant. The allegations are that on 16.12.2017 the prosecutrix after having dinner took all the jewellery from the cupboard as she was under the influence of Sehjad and left home. They followed her. It was alleged that Sehjad enticed her and they were searching for her at their own level and the girl and the jewellery be recovered.

The police registered the FIR and challaned Sehjad and two other persons. The trial commenced. The prosecution closed its evidence on 06.09.2018. On the same day an application (Annexure P-2) was moved by the complainant. The contents of the application reads as under:-

- 1. That the above noted case is pending in this Hon'ble Court and the same is fixed for today for PWs*
- 2. That on dated 16.12.2017 the applicant/complainant make a call to 100 number/control room Palwal regarding the incident through his mobile phone and said facts also disclosed to the Police officials but at the time of submitting the challan the I.O. of the case did not obtain the copy of the record of call detail and I.O. of the case did not obtain the call detail record of above said mobile numbers from the Cyber Cell Palwal to prove the presence of the accused at the place of occurrence. The appearance of the above said witnesses are very essential to prove the case of the prosecution.*

It is, therefore, prayed that the present application of the applicant u/s 311 Cr.P.C. for summoning the above said witnesses may kindly be allowed, in the interest of justice.

The defence did not want to file reply. Arguments were heard the same day and the application was dismissed.

The complainant wanted to summon the record from the control room with respect to the call made to the police between 7:50 PM to 8:00 PM on 16.12.2017 as well as the officials of the Cyber Cell with the CDR record of three mobile numbers between 3:00 PM (16.12.2017) to 6:00 AM (17.12.2017).

I have heard counsel of both the sides.

The submission on behalf of the petitioner is that the complainant had seen the accused taking his cousin and as he was following them and he went home and made a call to the police control room at no.100 and the police had asked him to give the registration number of motorcycle but thereafter the complainant started searching on his own but could not find her and the FIR was lodged on the next day. The counsel states that though in the complaint there is no reference to this call. The counsel states that the conduct of the Investigating Officer needs to be seen as he did not collect the call details and was not appearing in the Court and his salary was attached and it is only on 06.09.2018 that he appeared and his salary was released and cause of action to file the application arose only then. The counsel has also placed on record the statement given by the Investigating Officer and the statement recorded under Section 313 Cr.P.C. Reliance was placed upon ***Rajendra Prasad Vs. The Narcotic Cell through its Officer-in charge, Delhi 1999(3) RCR (Crl.) 440*** and ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd. 2008(3) RCR (Crl.) 897.***

The petition is opposed by the private respondents and it was urged that there is no reference to any call in the complaint and they want to

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cover up the delay and fill up the lacuna which cannot be allowed. It was urged that the complainant had given his statement in May 2018 and no reason has come forth as to why the material could not be summoned and no question was put to the Investigating Officer regarding this. It was urged that the trial Court has heard the final arguments and the case was posted for orders for today.

The trial Court while dismissing the application had noted that the complainant side was represented by a private counsel throughout and the charge framed against the accused was of abduction and rape and that would be primarily dependent on the testimony of the victim and the application was dismissed. It had also observed that the complainant cannot seek recovery of some more evidence. It had observed that there was delay in filing the application.

The prayer made in the application is that the records of the control room/wireless maintained by the police of all the call details received by them on 16.12.2017 from 7:50 PM to 8:00 PM be summoned. The body of the application does not refer to these facts and are disclosed only in the head note. The second prayer made was that they wanted to summon the record along with the location and record of the owner of the three mobile numbers.

The case of the complainant is that he had made a call to the police and that call is registered with them and the record be summoned and as it is essential to explain the delay in lodging the FIR but intimation had already been given. The other prayer is to summon the record along with the

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location of three mobile numbers. The application does not disclose as to in whose name these mobile numbers were allotted. The application is silent and therefore this evidence is irrelevant. The complainant has been unable to explain the relevance. The submission was that these numbers would show the location of the accused in that area.

It is relevant to refer to the scope and ambit of Section 311 Cr.P.C. [Section 311](#) Cr.P.C. empowers the Court to summon any material witness if his evidence appears to be essential for the just decision of the case. [Section 311](#) Cr.P.C. is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. [Section 311](#) Cr.P.C. reads as under:-

"311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, 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."

A reading of the provisions above would show that the Court has ample power to summon any person or recall a witness if the evidence is essential for the just decision of the case. However, it is also settled that either of the parties cannot be allowed to fill up the lacuna. The application had been moved when last opportunity had been granted to the prosecution and only the Investigating Officer was to be examined who was examined

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the same day. The statement of the Investigating Officer is available on record and a reading of it shows that no question was put to the Investigating Officer regarding this call. The complainant does not even know at what serial number the call was registered in the Police register. No information was collected under the RTI Act. The complainant was represented by a counsel throughout the trial.

The submission on behalf of the petitioner was that they wanted to summon the call made on 16.12.2017 to explain the delay in lodging the FIR. The explanation cannot come that late. It is not a fact which was not in the notice of the petitioner earlier. It is not even a case where some material has been discovered subsequently. The Court cannot allow production of evidence which is already known to the complainant just to fill up the lacuna. The authority cited by the petitioner namely ***Rajendra Prasad Vs. Narcotic Cell***, is not applicable on facts. It was a case where Public Prosecutor had closed the evidence without verifying whether the cross-examination of the witnesses had been concluded, therefore, the application was allowed. The High Court dismissed the revision. Aggrieved by the order, the accused approached the Apex Court and the appeal was dismissed. It was held that it was a case oversight by the Public Prosecutor during trial and it was not a lacuna which was being filled up.

In the second case relied upon by the petitioner namely ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd.***, the facts are entirely different. There the complainant was not assisted by the counsel and he did not introduce cheque, legal notice etc., which came to the notice after a

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delay. But considering the facts the appeal was allowed by the Supreme Court. The facts are referred in para 4 of the case, which read as under:-

“In support of the appeal learned counsel for the appellant submitted that the examination in chief of the witness Shri Deepak Jotshi was done on 29.7.2003. On that particular date, the counsel for the accused had taken an objection that the applicants counsel was asking misleading questions. Hence the trial Court had directed the witness to give his statement and as a layman, he gave his statement. But inadvertently he had not proved the relevant documents i.e. cheques, cheque returning memos, legal notice, courier receipt, letter from complainant bank, whereas, some of the above said documents had already been proved by other witness, other than the complainant.”

Reverting back to this case, the prayer for summoning the CDR with respect to the two mobile numbers has to be rejected as no material was placed on record by the complainant to show that the sim were allotted to any of the accused. In fact it is an attempt by the complainant to collect evidence at the final stages of the trial. As regards the other prayer, it does not find a reference in the FIR, it was not even put to the Investigating Officer. No document was collected by the complainant to show that any call was registered from his phone. He did not even place any document to show the sim allotted to him. I find no infirmity in the finding recorded by the Court below. The petition is dismissed.

15.11.2018
sunil

(ANITA CHAUDHRY)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No