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

CRR No.3063 of 2017 (O&M)

Date of decision: May 18, 2018

Shiv Lal @ Sholly

.....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI

Present: Mr. Vinod Ghai, Senior Advocate with
Mr. J.S. Mehndiratta, Advocate for the petitioner.

Mr. H.S. Sullar, DAG Punjab.

Mr. S.P.S. Tinna, Advocate for the complainant.

A.B. CHAUDHARI, J (Oral)

By the present revision petition, the petitioner-original accused-Shiv Lal @ Sholly has put to challenge the revisional order dated 02.08.2017, in Sessions Trial No.SC/32/2016 passed by the Ist Additional Sessions Judge, Fazilka, in FIR No.120 dated 12.12.2015, under Sections 302, 307, 326, 148, 149, 120-B/115/201 of Indian Penal Code, 1860 (for short 'IPC'), Section 3(2) V of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, registered at Police Station Bahav Wala, by which the learned trial Court exercising the power under Section 311 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') allowed the prayer made by Kaushalaya Devi for examination of Akash son of Rajinder Kumar.

FACTS

The incident in FIR No.120 dated 12.12.2015 relates to the

murder of Bhim Tank and injuries to Gurjant Singh as reported by Ranjit Singh, the complainant, brother of Gurjant Singh, to the police. In the FIR that was registered, the name of the petitioner-Shiv Lal @ Sholly was not at all indicated. But in the supplementary statement that was recorded on the same day, namely 12.12.2015 of complainant-Ranjit Singh, Shiv Lal @ Sholly was named as a conspirator. On 17.12.2015, police recorded the statement of Gurjant Singh. Thereafter, on 21.12.2015, statement of **Akash son of Madan Lal** was recorded, who also stated of alleged conspiracy by the petitioner. On the same day, the statement of Kaushalaya Devi, mother of the deceased was recorded who also stated about conspiracy. On 29.02.2016, polygraph test was conducted and thereafter, the petitioner was declared innocent. The police completed the investigation and filed a final report in the form of challan, on 12.03.2016, in which the petitioner-Shiv Lal @ Sholly was not named as an accused. After the commencement of the trial, the evidence of Sunil Kumar, the brother of the deceased was recorded, on 15.03.2016, in which he stated that he had heard about the conspiracy made by the petitioner. On 17.04.2016, police filed supplementary challan against the petitioner-Shiv Lal @ Sholly. Thereafter, on 03.08.2016, the trial Court framed the charge against the accused persons and the evidence began, on 01.09.2016.

The controversy qua the impugned order is regarding summoning of the person **Akash son of Rajinder Kumar** as a witness

under Section 311 Cr. P.C., in the trial filed by Kaushalaya Devi appended by public prosecutor. In the status report that was filed on 07.04.2017, again, there was no disclosure about the name of the witness Akash son of Rajinder Kumar. Thereafter, on 12.01.2017, evidence of Kaushalaya Devi was recorded who also did not say a word about Akash son of Rajinder Kumar as a witness. However, on 04.03.2017, Kaushalaya Devi came alongwith an application under Section 311 Cr. P.C. enclosing a photocopy of statement under Section 161 Cr. P.C. of Akash son of Rajinder Kumar, praying for order under Section 311 Cr. P.C. The application was endorsed by the public prosecutor. The evidence of PW9-Harjeet Singh, SSP, who was the Investigating Officer who had recorded the statements of witnesses was also recorded, but in his cross-examination, he admitted that there was no statement of Akash son of Rajinder Kumar ever recorded in the police record. It is in the above factual scenario, after hearing the parties, the learned trial Court allowed the application. Hence, this revision petition.

ARGUMENTS

In support of the revision petition, Mr. Vinod Ghai, learned Senior Counsel for the petitioner vehemently contended that power under Section 311 Cr. P.C. could not have been exercised by the trial Court in the fact situation as name of the said person Akash son of Rajinder Kumar, never figured during investigation and thereafter, i.e. at the time of filing challan and supplementary challans and on the contrary, PW9-Harjeet Singh, SSP, Investigating Officer clearly

admitted that he never recorded such statement nor police file shows any such recorded statement. According to him, since the statement of Akash son of Rajinder Kumar was neither recorded nor the same was filed with the challan or supplementary challan nor was he cited as a witness in the list of witnesses, he could not be a witness. It is for the first time Kaushalaya Devi, the complainant who had no *locus standi* to file application under Section 311 Cr. P.C., that she enclosed a photocopy of alleged statement under Section 161 Cr. P.C., which did not have any date nor the factum of such statement was supported by the State. The State never claimed that the Investigating Agency had recorded the statement of the said person. He, therefore, contended that the trial Court could not have exercised the power citing the discretion. The discretion is judicial discretion, which does not depend on whims and fancies. Except for saying that no prejudice will be caused to either side, if the said person is summoned, there is no other reason in the impugned order as to why Akash son of Rajinder Kumar was ordered to be examined when the entire prosecution evidence has been completed and the accused have disclosed their defence in entirety and nothing further remained to be done. The power under Section 311 Cr. P.C. could not be utilized at the instance of the complainant to introduce fresh evidence or any statement by way of photocopy that too without having any date, and particularly in the background that the Investigating Officer, Harjeet Singh admitted that no such statement was recorded nor the same is available anywhere in the police file. He, therefore, submitted that the entire exercise was abuse

of process of law at the instance of the complainant and without following the procedure contemplated by Section 173 Cr. P.C. and Section 311 Cr. P.C. The provision of Section 173 Cr. P.C. cannot be ignored as sought to be done as there is safeguard inbuilt in the said provision, namely that neither prosecution nor the complainant would be entitled to introduce their own evidence which did not form part of the investigation and the final report. He thus, prayed for allowing the revision petition.

Per contra, learned State counsel and the complainant opposed the petition and supported the impugned order and the reasons recorded therein by the trial Court. They submitted that in the examination-in-chief, the Investigating Officer, Harjeet Singh, SSP, restated that he had recorded the statement of Akash son of Rajinder Kumar. Therefore, according to them, the factum of recording the statement is restated by him on oath, in the examination-in-chief, which was good enough for the trial Court to proceed under Section 311 Cr. P.C. to examine the witness. At any rate, according to the counsel for the respondents, by examining the said witness, no prejudice can be caused to the accused persons that they would always get opportunity to cross-examine the said witness. The order under Section 311 Cr. P.C. is discretionary and should not be interfered with by this Court in its revisional jurisdiction as no error has been committed by the trial Court. Learned counsel, therefore, prayed for dismissal of the present revision petition.

CONSIDERATION

After filing of the present petition in this Court, on 31.08.2017 this Court, by way of interim order allowed the trial to proceed, but prohibited the trial Court from recording the evidence of Akash son of Rajinder Kumar. Thereafter, at the time of admission hearing, on 29.09.2017, this Court heard the parties and made the following order:-

*“Rule.
Heard learned counsel for the rival parties.
Interim order dated 31.08.2017 passed by this Court, is made absolute.
The trial Court can proceed with the regular trial.”*

The above order shows that this Court issued Rule, which means '*rule nisi*' that the matter was admitted for final hearing and the interim order that was made on 31.08.2017 was made absolute with a further direction that the trial Court can proceed with the regular trial. However, it appears that the Registry under misconception or lack of knowledge about the word “Rule” published on the website that the revision petition was disposed of by this Court, finally. Perusal of the above order dated 29.09.2017 thus, shows that this Court had not at all finally disposed of the petition, but by issuing Rule, only admitted the matter for final hearing and thus, the matter was required to be kept pending for final hearing. The said order dated 29.09.2017 was challenged before the Supreme Court with representation that the matter was decided finally. The Supreme Court vide order dated 19.03.2018 in Criminal Appeal No.411 of 2018, made the following order:-

“Leave granted.”

We see no reason how the matter could have been disposed of in one line by the High Court, and that too by merely making the interim order dated 31.08.2017, absolute.

We need not remind the High Court that this has been held to be impermissible by this Court in several decisions.

We, therefore, set aside the impugned order passed by the High Court and remand the matter back to the High Court for fresh decision in accordance with law after hearing both the parties and by passing a reasoned order on merits.

The High Court is requested to dispose of the matter as expeditiously as possible preferably within a period of two months from the date on which a copy of this order is produced before it.

Till the final decision, the interim order dated 31.8.2017 passed by the High Court shall continue.

Hence, the appeal is disposed of in the above terms.”

The matter thus came back for disposal again and therefore, this Court directed the office to obtain necessary orders from Hon’ble the Chief Justice for listing the same. The Registry obtained orders and that is how, the above revision petition has been placed before this Court for final hearing.

To repeat, this Court had never decided the above revision petition finally much less by one line order as stated earlier. Be that as it may, this Court with the consent of the parties, heard the same finally and accordingly, the revision petition was heard.

Having heard learned counsel for the rival parties, at the

outset, I find that as narrated above, the police had filed challan on 12.03.2016 and supplementary challan on 17.04.2016 in accordance with Section 173 Cr. P.C. and nowhere, Akash son of Rajinder Kumar was cited as a witness nor his statement under Section 161 Cr. P.C. was recorded or incorporated in any challan and as stated by PW9-Harjeet Singh, SSP, the statement was not recorded nor the same was the part and parcel of the police file. The submission that he stated in the examination-in-chief that the statement was recorded would be good enough, is absurd because in the cross-examination, it is clearly stated that there was no such statement recorded nor available in the police file nor, as stated earlier, the same was filed in the challan or supplementary challan. In fact, he went through the police file also. It would be appropriate to quote the relevant portion from the examination-in-chief, cross-examination, re-examination and re-cross-examination of PW9-Harjeet Singh, which I quote hereunder:-

Examination-in-Chief:

“.....On 21.12.2015, during investigation of this case, statement of Kaushalia Devi mother of deceased Bhim Tank was recorded and transcription of the same is Ex.P82 and Video CD of the same is Ex.PW9/B. I also recorded statement of Akash son of Madan Lal and Akash son of Rajinder Kumar.....”

Cross-Examination:

“.....Akash son of Madan Lal u/s 161 Cr. P.C. was recorded on 21.12.2015. I do not recall if on 21.12.2015 I recorded the statement of Akash son of Rajinder also. However I can recollect this fact after going

through the case diary. I have gone through the case diary of this case dated 21.12.2015 as there is no mention of recording of statement of Akash son of Rajinder on that day. Therefore statement of Akash son of Rajinder may not recorded on 21.12.2015.....”

Re-Examination:

“At this stage learned Addl. PP for the state requested that he may be allowed to re-examine the witness as he has recorded the statement of one Akash son of Rajinder Kumar and he has also filed an application u/s 311 Cr. P.C. for summoning the witness. The Additional PP for the state also handed over the police file to this court wherein the original statement of one Akash son of Rajinder Kumar is lying. Heard. Request allowed.

During investigation on 21.12.2015 I have got recorded statement of Akash son of Rajinder Kumar. I have seen the statement which bears my signatures.”

Re-cross-examination:

“It is correct that application u/s 311 Cr. P.C. for seeing permission to examine witness namely; Akash son of Rajinder Kumar resident of Street No.4, Sant Nagar, Abohar by way of additional was moved by Kaushalaya Devi wife of Kapoor Tank mother of deceased Bhim Tank on 04.03.2017. This application was also endorsed by learned Additional Public Prosecutor. This application was also accompanied with the photostat copy of the statement. It is correct that the said photocopy does not bear the date of recording the same is blank. It is also correct that in the application u/s 311 Cr. P.C. dated 04.03.2017 the address of Akash son of Rajinder Kumar is mentioned as resident of Street No.4, Sant Nagar, Abohar

whereas on the original statement the address of Akash son of Rajinder Kumar is mentioned as Street No. 0, Sant Nagar, Abohar. It is also correct that the date mentioned on the original statement brought on the judicial record today bears date as “21.12.2015” with different ink and the same is not in my handwriting. As per case diary no statement of Akash son of Rajinder Kumar is mentioned to have been recorded in case diary dated 21.12.2015.”

A careful reading of the above evidence clearly shows that the application under Section 311 Cr. P.C. was filed by Kaushalaya Devi accompanied by photocopy of a statement of Akash son of Rajinder Kumar, which did not have any date and had a different address altogether and the date of the original statement was in different ink, which was not in his handwriting. He asserted by pointing out from police case diary that no statement of Akash son of Rajinder Kumar was mentioned in the case diary dated 21.12.2015. As seen earlier in the re-examination, it is stated that he had recorded the statement on 21.12.2015 but in cross-examination, he deposed as aforesaid. It is then important to note that none of the witness examined before the trial Court during trial, uttered a word about Shiv Lal @ Sholly or his alleged conspiracy in order that trial Court could exercise its power under Section 311 Cr. P.C. that the name of the petitioner appeared in the evidence of the witnesses and therefore, it was necessary to summon Akash son of Rajinder Kumar as a witness. The facts and the evidence stated above are clearly contradictory and it appears that the trial Court merely acted on the application filed by

Kaushalaya Devi, who inserted the photocopy of alleged statement alongwith her application. In the wake of denial by Harjeet Singh, PW-9, that he never recorded his statement nor the same is in the case diary, the trial Court could not acted on alleged photocopy of undated statement.

It is most significant to note that even till date, the prosecution has not either relied on nor filed any statement of Akash son of Rajinder Kumar by any method including the method contemplated by Section 173 Cr. P.C. but what is on the record of the trial Court, is a photocopy of undated alleged statement under Section 161 Cr. P.C., of Akash son of Rajinder Kumar, and nothing more. If at all the prosecution wanted to rely upon or cite him as a witness, the same ought to have been the part and parcel of the report under Section 173 Cr. P.C., which is the *sine qua non* for proceeding further in a police case. This is the first principle in a police case. In the absence of the said mandatory procedure being followed, I do not think prosecution can be allowed to be carried away by any other person or agency, or complainant except the State which is the prosecuting agency. To put in other words, the trial Court could not have acted on the basis of the application filed by Kaushalaya Devi who has not even filed the original alleged statement under Section 161 Cr. P.C., but has filed a photocopy which did not even bear any date and the same did not form part and parcel of any report under Section 173 Cr. P.C. as stated by the Investigating Officer. If such a course of action is allowed in a prosecution filed by the State, the mandate of law and the

concept of fair trial will be violated, which cannot be allowed. The trial Court has given a reason in its order that no prejudice will be caused to either side, if the said person is examined, but it has not given any reason as to on what foundation the said person is required to be examined. The discretion contemplated under Section 311 Cr. P.C. has to be judicial discretion and cannot be fanciful.

It is then, seen that the prosecution has completed its evidence before the trial Court and the accused persons have also cross-examined the witnesses. But then that may not be a deciding factor in such matters. At any rate, for the reasons given by me above, the impugned order suffer from the error of the jurisdiction vested in the trial Court. Liberty is granted to the complainant and the State to take such steps as are available in law. In the result, I make the following order:-

ORDER

- (i) CRR No.3063 of 2017 is allowed;
- (ii) Impugned order dated 02.08.2017 passed by Additional Sessions Judge-I, Fazilka, is set aside;
- (iii) Trial to proceed, with liberty as indicated.

(A.B. CHAUDHARI)
JUDGE

May 18, 2018

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Whether speaking/ reasoned: **Yes**

Whether Reportable: **Yes**