

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

**CRR-1581-2018 (O&M)
Date of Decision: 27.11.2018**

Dharmender

.....PETITIONER(s).

VERSUS

State of Haryana and another

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

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

Mr. Brijesh Sharma, AAG, Haryana.

Mr. Akashdeep Singh, Advocate,
for respondent No.2.

RAJ SHEKHAR ATTRI, J.(Oral)

This is a revision petition against the impugned order dated 22.3.2018 whereby the application to further cross-examine PW10 Sarupi has been allowed.

Affording adequate opportunity to the parties in a *lis* is the fundamental principle of natural justice and is integral part of fair trial.

After framing a charge, this is for the criminal court to search for the truth and for this purpose, to call for evidence. The Court has ample power under Section 311 Code of Criminal Procedure (in short, “the Code”) read with Section 165 of the Evidence Act to summon any

witness.

Hon'ble Supreme Court in **Zahira Habibulla H. Sheikh and another v. State of Gujarat and others** held in para 30 and 31 as under : -

“30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court", Vice-Chancellor Knight Bruce said :

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good

things, may be loved unwisely - may be pursued too keenly - may cost too much.”

The Vice-Chancellor went on to refer to paying "too great a price... for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms : "The evidence has been obtained at a price which is unacceptable having regard to prevailing community standards."

In the case in hand, the petitioner was facing trial for offence under Sections 323, 325, 302, 506 of Indian Penal Code (in short, “IPC”). The complainant who is in fact the victim of the crime, had moved an application under Section 311 of the code for recall of PW10 Smt. Sarupi for further cross-examination on the ground that she was examined in the absence of the counsel for the victim who was assisting the State counsel, as such, she could not be examined properly and the victim has been deprived to cross-examine her.

Said application was contested. However, the same was allowed by learned Sessions Judge, Rohtak vide impugned order dated 22.3.2018 by observing in para 10 as under : -

“10. Despite the fact that the witness has been cross-examine at length, the recalling of PW10 Sarupi would be necessary though there is no specific provision under the law for the cross examination by private counsel. This circumstance has arisen because of non supportive attitude of PW Sarupi, who happened to be mother of the accused as

well as deceased and was allegedly injured in the present occurrence. On the contrary, the applicant while appearing in the witness box as PW12 has fully supported the prosecution story. In the given circumstances, it would be expedient in the interest of justice and heaven is not going to fall if one opportunity is granted to the counsel for the applicant to conduct cross examination again upon PW10 Sarupi, on certain material facts. The purpose of allowing the application is to unveil the truth in the allegations and the application can not be dis-allowed merely on the ground of technicalities. Hence in the interest of justice, the application is allowed and PW Sarupi is ordered to be summoned for 11.04.2018 i.e. the date already fixed, in the main case.”

Said order has been assailed before this Court merely on the ground that the application was filed by a private counsel and that there is no provision under the law that the said witness be cross-examined by the private counsel because public prosecutor is the master of the prosecution case before a trial court.

I have heard the learned counsel for the parties and gone through the record.

Counsel for the petitioner has vehemently contended that in a session trial, the private counsel has no independent role and he is only to assist the public prosecutor, as such, the private counsel engaged by the complainant has no right to file an application under Section 311 of the Code. To substantiate his plea, he places reliance upon the ruling of Hon'ble Supreme Court in **Dhariwal Industries Limited v. Kishore Wadhwani & others**; 2016 (4) RCR (Criminal) 371.

On the other hand, learned counsel for the State has submitted that the application was submitted for additional evidence which was also endorsed by the State and further cross-examination shall be conducted either by the public prosecutor or with his consent by the private counsel. He further submits that the petitioner is the victim and she has right to file an application. In support of his contention, he places reliance on ruling of Hon'ble Supreme Court in **Himanshu Singh Sabharwal v. State of M.P. and others**; passed in Transfer Petition (Crl.) No.175 of 2007 decided on 12.3.2008, of Gujarat High Court in **Ghanshyambhai Madhavlal Patel v. State of Gujarat and another**; 2014 (5) GLR 4419 and of Telangana and Andhra Pradesh High Court in **Gude Bhavani Sujatha v. Muggulla Srinivasa Rao and another**; 2015 (17) RCR (Criminal) 468.

This Court has given its thoughtful consideration to the rival contentions of the parties.

The victim has always remained ignored in this country. However, an amendment was made in the Code by Code of Criminal Procedure (Amendment) Act, 2008, No.5 of 2009 and the amendment came into force with effect from 31.12.2009. Sub Section W-A added to Section which defines that term, "victim" is a person who has suffered any loss or injury caused by reason of the Act or omission for which accused person has been charged and expression, "victim" includes his or her guardian or legal heir.

Further amendment was made under Section 24(8) of the Code which provides that the Court may permit to victim to engage an

Advocate of his choice to assist a public prosecutor. This case relates to murder of Krishan son of Sube Singh. As per the FIR, his mother suffered a statement before the police wherein she has stated that on 8.8.2016 at about 8:00 p.m., her son Krishan and accused Dharmender had an altercation, due to which, Dharmender became furious and lifted a *jaile* which was lying in the corner of the house and thrust the *jaile* in the left eye of the deceased Krishan and Krishan fell down on the ground and died. When she appeared as a witness, she turned hostile and has stated that two persons had caused injuries to her son with a *jaile* and *lathis*. She was cross-examined by the public prosecutor as well as by the learned defence counsel.

It has been argued before this Court by learned State counsel as well as counsel for the complainant that although public prosecutor cross-examined her but some material questions could not be put to her and even she was not properly confronted with her police statement.

This Court is of the view that in such a serious crime, where the deceased was murdered by giving *jaile* blow in his eye, the prosecutor must be serious and responsible.

Learned Sessions Judge has observed that evidence of PW10 Sarupi is essential for just decision of the case. Although the application has been filed by the public prosecutor but learned trial Court has observed that further cross-examination of Smt. Sarupi PW10 is essential to unveil the truth on the allegations and such an application cannot be disallowed on the ground of technicalities.

A Judge by holding a criminal trial cannot be taken as a moot

spectator. It is for him to choose and select evidence which is essential for just decision of the case and interest of justice. He can even suo motu summon any witness of his own who has neither been cited as a witness nor has been called by the prosecution.

In **Zahira Habibulla H. Sheikh's** case (supra), it was further observed in para 43 and 44 as under : -

“43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Courts cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts

i.e. (i) giving a discretion to the court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In ***Mohan Lal v. Union of India (1991 Supp. (1) SCC 271)*** this Court has observed, while considering the scope and ambit of Section 311, that the very usage of "words such as, 'any Court', 'at any stage', or 'any enquiry or trial or there proceedings', 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. 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 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.”

Apart from it, the State has already adopted the application

filed by the private counsel of the complainant and in these circumstances, it cannot be said that the complainant or his counsel had no right to file the application.

However, facts in *Dhariwal's* case (supra) is distinguishable on facts. In that case, after the charge was filed, the accused persons filed an application under Section 239 of the Code seeking their discharge. At that stage, the complainant made an oral prayer before the learned Magistrate seeking permission to be heard along with Assistant Public Prosecutor.

Learned Magistrate granted the permission. However, the said order was challenged before the High Court by filing a revision petition and the said order was reversed by holding that the private counsel cannot be allowed to take over control of the prosecution by directly addressing the Court but has to act under the directions of the Assistant Public Prosecutor incharge of the case. It was observed by Hon'ble Supreme Court in para 18 to 20 as under : -

“18. We have already explained the distinction between Sections 301 and 302 Cr.P.C. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 Cr.P.C. is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

19. We would have proceeded to deal with the relief prayed for by Mr. Tulsi but, no application was filed under Section 302 Cr.P.C. and, therefore, the prayer was restricted to be heard which is postulated under Section 301 Cr.P.C.

Mr. Singh, learned senior counsel appearing for the respondents would contend that an application has to be filed while seeking permission. Bestowing our anxious consideration, we are obliged to think that when a complainant wants to take the benefit as provided under Section 302 Cr.P.C., he has to file a written application making out a case in terms of J.K. International (supra) so that the Magistrate can exercise the jurisdiction as vested in him and form the requisite opinion.

20. Mr. Tulsi, learned senior counsel appearing for the appellant submits that he intends to file an application before the learned Magistrate and hence, liberty may be granted. Mr. Singh has seriously opposed the same. Regard being had to the rivalised submissions, we only observe that it would be open to the appellant, if so advised, to file an application under Section 302 Cr.P.C. before the learned Magistrate. It may be clearly stated here that the said provision applies to every stage including the stage of framing charge inasmuch as the complainant is permitted by the Magistrate to conduct the prosecution. We have said so to clarify the position of law. If an application in this regard is filed, it shall be dealt with on its own merits. Needless to say, the order passed by the learned Magistrate or that of the High Court will not be an impediment in dealing with the application to be filed under Section 302 Cr.P.C. It is also necessary to add that we have not expressed any opinion on the merits of the application to be filed.”

However, in the case in hand, the application for recalling PW10 Sarupi has never been opposed by the State, rather the State has given its consent for her recalling.

On an independent appraisal of the material available on record, the impugned order dated 22.3.2018 does not suffer from any illegality, irregularity and infirmity. Consequently, the present petition is dismissed.

November 27, 2018
Paritosh Kumar

(RAJ SHEKHAR ATTRI)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes/No</i>
<i>Whether Reportable:</i>	<i>Yes/No</i>