

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

CRR No.2317 of 2018 (O&M)

Date of Decision: December 14th 2018

Lakhan

...Petitioner

Versus

State of Haryana

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Vikas Kumar, Advocate
for the petitioner.

Mr. P.P. Chahar, DAG Haryana.

Mr. Vaibhav Sharma, Advocate
for the complainant.

JAISHREE THAKUR, J.

This is a criminal revision that has been filed seeking to challenge the order dated 03.07.2018 passed by the Addl. Sessions Judge, Faridabad whereby, the application filed by the petitioner-accused under Section 311 Cr.P.C. for recalling PW3/prosecutrix was dismissed.

2. In short, the facts of the case are that, complainant-Hatpal got lodged the FIR No.562 dated 15.07.2017, under Sections 363, 366-A, 342, 354-D, 376(2)(n), 506, 120-B of Indian Penal Code, Section 6 of POCSO Act and Sections 24, 54, 59 of Arms Act at Police Station Surajkund, Faridabad on the allegations that his daughter (prosecutrix), aged 17 years, who is a student of 9th standard, has been enticed away on the pretext of

marriage by the petitioner-accused, who is already married. After completing the investigation, challan was presented, charges were framed and prosecution witnesses were examined. When the case was fixed for recording statements of the accused under Section 313 Cr.P.C., an application under Section 311 Cr.P.C. for recalling the PW3/prosecutrix for her further cross-examination came to be filed by the petitioner-accused, which application was dismissed by the order dated 03.07.2018, which order is impugned in the instant criminal revision.

3. Learned counsel appearing on behalf of the petitioner herein would contend that at the time of recording the evidence of PW3/prosecutrix, the petitioner-accused had to ask some questions in respect of recording/conversation of prosecutrix's sister on mobile phone, but since the original phone was misplaced, she could not be cross-examined regarding the said recording/conversation. It is submitted that after the said phone has been found, the petitioner-accused moved an application to recall PW3/prosecutrix for further cross-examination, but the said application has been wrongly dismissed by the trial court. It is argued that the said recording/conversation is necessary for the defence of the petitioner/accused. It is also contended that the FSL report was not made part of the challan and was tendered by the prosecution during the course of trial, but the same was not available with the defence counsel at the time of examination of the prosecutrix. In support of his contentions, learned counsel relied upon judgments rendered in **Rattan vs. State of Haryana, 1995(3) RCR (Cri) 26** and in **Khatta Singh vs. C.B.I. Chandigarh and others, CRR No.3592 of 2017** decided on 24.04.2018 by this High Court.

4. Per Contra, learned counsel appearing on behalf of the respondent-State as well as complainant would contend that a vague application under Section 311 Cr.P.C. has been moved by the petitioner-accused, just to delay the trial of the case. It is submitted that the order passed by the trial court is well reasoned.

5. I have heard learned counsel for the parties, apart from perusing the pleadings of the case.

6. The trial court, while dismissing the application moved by the petitioner-accused under Section 311 Cr.P.C. has observed that in the present case, the prosecutrix has been examined in the court on 18.12.2017 and in view of the objection raised by learned counsel for the accused, the cross-examination was deferred for the next date i.e. 22.02.2018. From the cross-examination of the prosecutrix, it is made out that no specific question was put to her mentioning any mobile number either of the petitioner-accused herein or any other person with the suggestion that she used to have telephonic conversations. The trial court has further observed that in her cross-examination, the prosecutrix had already disclosed the mobile number which according to her had been given to her by the petitioner-accused prior to the date of occurrence. In the application moved by the petitioner-accused, no phone number of the mobile phone alleged to have been misplaced has been mentioned. Even otherwise, even if it is taken that the mobile phone of the petitioner-accused had been misplaced, since the mobile number had been in their knowledge before conducting cross-examination of prosecutrix, the petitioner/accused could have obtained the record of recording/conversation from the concerned company which has

not been done. The trial court has further observed that in the application, it has not been mentioned that to whom the mobile phone which has been misplaced belonged nor it has been mentioned whose conversation/recording the petitioner/accused want to be put to the prosecutrix or of which period. So far as the objection raised regarding FSL report is concerned, the trial court has noted that the FSL report was tendered by the learned APP vide his statement dated 18.12.2017 and on the same day the prosecutrix was examined whereas, the prosecution has been cross-examined on the date thereafter.

7. Section 311 of Cr. P.C. reads as under:-

“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.”

A reading of the above section would show that the first part gives discretionary authority to the court enabling it to exercise its powers at any stage of inquiry, trial or other proceedings under the code. It can summon any person as a witness, examine any person in attendance, who may not even be summoned a witness and can recall and re-examine any person already examined. However, while exercising discretionary powers, there is a mandate which imposes an obligation on the court either to summon, examine or recall or re-examine any person, if in the opinion of the court, evidence of such person appears to be essential to the just decision of the case. No general principle or rule can be laid down in

exercise of such discretionary powers of the court except that the evidence is essential for the just decision of the case and in such a situation, the court is bound to summon, examine or recall or re-examine any such person whether he is a witness or not and has been examined earlier or not and examine or recall any person including a person who is in attendance.

8. There are a plethora of decisions, which are in favour of recalling the witnesses under Section 311 Cr.P.C., whenever it appears that it is so necessary for *proper adjudication of the case*, depending upon the facts and circumstances of each case, with a rider that the evidence appears to be essential for the said purpose. However, this power has to be exercised with great care and caution. This court has gone through the application moved by the petitioner-accused before the trial court under Section 311 Cr.P.C. (Annexure P-1) which is a vague application, without disclosing any mobile number, to whom the said phone belonged or when it was misplaced or found and also that whose conversation/recording the petitioner-accused want to put to the prosecutrix. It is pertinent to mention here that in the grounds of revision before this court (originally filed) in para 07, the petitioner-accused has *first time disclosed* that the said recording/conversation is of the prosecutrix, however, during the pendency of the revision petition, learned counsel for the petitioner sought to make correction in the said pleadings to the effect that there is a recording of sister of the prosecutrix, which would reveal that the petitioner has been falsely implicated in the present case. Consequently, the amended grounds of revision has been filed. In this case, there are allegations that the petitioner-accused, who is already married, enticed away the minor daughter

of the complainant on the pretext of marrying her. The petitioner-accused, by invoking the provisions of Section 311 Cr.P.C. wants to recall the prosecutrix, who was examined as PW3, on the ground that he would like to ask some questions from her in respect of the alleged recording of the prosecutrix's sister in which it has been revealed that the petitioner-accused has been falsely implicated. First of all, the alleged recording/conversion is not of the prosecutrix, who is a victim in this case and secondly, there are certain other requirements of law, which should be satisfied before accepting it. It is settled principle of law that apart from the tape recorded conversion being relevant according to the rules of Evidence Act; (i) the voice of the speaker in the recording must be duly identified by the maker of the record or by others, who recognizes the voice; (ii) where the voice has been denied by the maker it will require very strict proof to determine the same; (iii) the accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence; (iv) every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out; (v) the recorded cassette must be carefully sealed and kept in safe or official custody; (vi) the voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances. In the instant case, the petitioner-accused wants to put the alleged recording/conversion to the prosecutrix/victim, which does not belong to her, apart from not satisfying the other requirements of law in this regard. Under these circumstances, it cannot be said to be essential for the just decision of the case.

9. In support of his arguments, learned counsel for the petitioner relied upon decisions rendered in **Rattan vs. State of Haryana** and **Khatta**

Singh vs. C.B.I. Chandigarh and others (supra). In the case of **Rattan vs. State of Haryana (supra)** witnesses PW2 and PW3 sworn in affidavits in favour of the accused that earlier they deposed before the court under the influence of the police and considering this factor, the application moved by the accused for recalling these witnesses was allowed by this High Court. In the case of **Khatta Singh vs. C.B.I. Chandigarh and others (supra)**, the witness Khatta Singh himself moved an application under Section 311 Cr.P.C. for his recalling, since earlier because of sense of insecurity and threat, he resiled from his statement which he had given to the CBI as well as from his statement recorded under Section 164 Cr.P.C. and it was under these facts and circumstances of the case, this High Court allowed the said application under Section 311 Cr.P.C. As such, these decisions are not applicable to the facts and circumstances of the present case.

10. In view of the above, the criminal revision is hereby dismissed, being devoid of any merits.

December 14th 2018

vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No