

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

CRR No.3070 of 2018

Date of decision : 12.09.2018

Jogender

.....Petitioner

Versus

State of Haryana and another

...Respondents

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

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

* * *

DAYA CHAUDHARY, J. (Oral)

The present revision petition has been filed to challenge the impugned order dated 24.08.2018, passed by learned Additional Sessions Judge, Jhajjar, whereby the application under Section 311 of the Code of Criminal Procedure, 1973 (for short – “Cr.P.C.”) moved by the prosecution has been allowed.

Learned counsel for the petitioner submits that FIR No.219 dated 28.06.2015 was registered under Sections 323, 341, 307 and 120-B of the Indian Penal Code, 1860 at Police Station Beri, Distt. Jhajjar. After a period of 3 years of trial, an application under Section 311 Cr.P.C. was moved by the prosecution for calling Amit Kumar, DSP Rohtak and Dr. Ishwar Singh, PGI MS, Rohtak as prosecution witnesses, just to fill up the lacuna, whereas Amit Kumar DSP, Rohtak had neither investigated the matter nor he was related to the case in any manner. Learned counsel further

submits that there is no document available on record bearing signatures of said DSP Amit Kumar relating to investigation of the case. Dr. Ishwar Singh might have given his opinion way back in January, 2017. The prosecution has tried to call these witnesses in the witness box to prove the documents which are not part of record. Learned counsel also submits that object of Section 311 Cr.P.C. is not to fill up the lacuna left by the prosecution but to advance justice. While passing the impugned order, the delay in moving the application has not been considered. The intention of the prosecution is not only to delay the trial proceedings but to fill up the lacuna.

Heard arguments of learned counsel for the petitioner and have also perused the impugned order, whereby application moved by the prosecution under Section 311 Cr.P.C. has been allowed.

In the present petition, the issue for consideration by this Court is as to whether any witness who is not part of list of witnesses can be examined by the trial Court at any stage.

Section 311 Cr.P.C. is relevant for deciding the present controversy, which is reproduced 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.”

Undisputedly as per provisions of Section 311 Cr.P.C., the Court can summon any person as witness at any stage of the trial, if the statement of that person is necessary to decide the controversy in dispute.

Section 311 Cr.P.C. consists of two parts. Part one provides discretionary power to the Court and the later imposes obligation on it in case the evidence of witness appears to be essential for just decision of the case. It is for the Court to see on the basis of material available on record that the evidence of such witness is essential for just decision of the case or not. It is obligatory for the Court to summon such witness. Discretion is provided to the Court which is to be exercised by keeping in view the facts and circumstances of the case

It was held by Bombay High Court in case ***Sunil Vassudev Pednekar Vs. Bicholim Urban Cooperative Bank Ltd., 2006 (3) RCR (Criminal) 713*** that Magistrate has power to permit the examination of witnesses under Section 254 (2) Cr.P.C.

Similarly, in case ***Dr. Chaithanya R. Menon Vs. State of Kerala and Ors., 2008 CriLJ 3392***, Kerala High Court has held that it is obligatory for the Magistrate to take all such evidence as may be produced in support of prosecution even in case the names of those witnesses are not mentioned in the list of witnesses.

Similarly, Bombay High Court in case ***Raosaheb s/o Namdeo Aher and anr. Vs. Bebitai w/o Pandit Sonawane and anr. 2009(3) AIR Bom. R 319*** has held that the Court can exercise the power under Section

311 Cr.P.C. to enable it to arrive at the truth irrespective of the fact that prosecution or defence has failed to produce some evidence, which is necessary for a just and proper disposal of the case.

Same view has been held by Hon'ble the Supreme Court in case ***Rajaram Prasad Yadav Vs. State of Bihar and another, 2013(3) RCR (Criminal) 726***, which is reproduced as under:-

“14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of reexamination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier.

The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and reexamined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

In **Rajaram Prasad Yadav’s** case (supra), it was also held that power under Section 311 Cr.P.C. can be invoked by the Court to meet out the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection and by keeping in view the interest of the accused, the victim and society and the grant of fair and proper opportunities to the persons must be ensured being a constitutional goal as well as a human right. The following principles have been laid down in para No.23 of said judgment, which are reproduced as under: -

- “a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*
- b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should*

not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record

due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

In the present case, the application has been moved by the prosecution on the ground that Amit Kumar, DSP Rohtak conducted the investigation of the case and found in the investigation that accused Sushila was also involved in the offence as she inflicted injuries to victim Sajjan Singh with a stone but due to inadvertence, name of DSP Amit Kumar could not be mentioned in the list of witnesses.

It has also been mentioned that accused persons inflicted head injuries to victim Sajjan Singh and on account of said injuries, injured Sajjan Singh was not in a position to speak well. Co-accused Jogender Singh filed CRM-M No.16221 of 2016 before this Court and this Court issued directions to examine the injured victim by the Board of Doctors of PGIMS Rohtak. In compliance of said directions issued by this Court, injured Sajjan Singh was medico legally examined by Board of Doctors of PGIMS Rohtak on 10.01.2017. Dr. Ishwar Singh was one of the Members of aforesaid Board and as such, his evidence is essential and necessary for the fair and proper disposal of the case.

Although the application moved by the prosecution was opposed on the ground of delay as well as on the ground that the motive to move the application is to fill up the lacuna in prosecution version. Said application was allowed vide order dated 24.08.2018 by the trial Court while holding that testimonies of PW Amit Kumar DSP Rohtak and Dr. Ishwar Singh PGI MS Rohtak are necessary to be recorded for just decision of the case, as the medico legal report of Board of Doctors dated 10.01.2017 is necessary to be placed on record as in the final report under Section 173 Cr.P.C. dated 23.09.2015 (Ex.PW7/N) it has categorically been stated that injured Sajjan Singh was not in a position to give any statement. He was discharged from Jaipur Golden Hospital on 22.08.2015 but still he was not in a position to give statement and Dr. Ishwar Singh was the Member of the Medical Board.

On perusal of impugned order it is also apparent that in the

supplementary charge-sheet filed by the prosecution on 09.02.2017 against accused Sushila, it has specifically been mentioned that investigation of the case was carried out by Amit Kumar DSP, Rohtak. Thereafter, investigation of the case was carried by PSI Rakesh Kumar, Rohtak. Accused Sushila was arrested on 15.01.2016, from whom a cemented stone used in the occurrence was recovered. The opinion of Board of Doctors dated 10.01.2017 qua injured was sought by the Investigating Officer in pursuance of order dated 07.11.2016, which is also a part of police investigation. In the final report submitted on 23.09.2015, it was specifically stated that injured was not in a position to give any statement.

It is satisfaction of the trial Court to see as to whether it is essential to summon any the witness for arriving at a just decision or not. It has been held in various judgments of this Court as well as of Hon'ble the Apex Court that the trial Judge is the best judge to decide the relevancy of the questions put by the defence counsel during cross-examination of a witness. The purpose and object of Section 311 Cr.P.C. imposes a duty on the Court to determine the truth to render a just decision. Accordingly, the power under Section 311 Cr.P.C. is to be exercised in order to meet the ends of justice for valid reasons but with care and caution.

The object of the Court is to discover truth. Section 311 of the Code is one of such provisions of the Code which strengthens the arms of a Court in making efforts to get the truth by procedure sanctioned by law. It empowers the Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or to examine any

person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court is to form an opinion that for the just decision of the case recalling or re-examination of the witness is necessary.

The exercise of this power is to be guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. The purpose is not to fill up the lacuna. Whether recalling of a witness is for filling up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. It is for the Court to consider all the circumstances and decide as to whether the prayer for recall is genuine or not.

In view of the facts and law position discussed above, this Court is of the opinion that a detailed reasoned order has been passed by the trial Court while allowing the application under Section 311 Cr.P.C. moved by the prosecution. The evidence of said two witnesses is necessary and essential for the proper disposal of the case.

Accordingly, the impugned order require no interference and the present petition, being devoid of any merit, is hereby dismissed.

12.09.2018

sunil yadav

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No

**(DAYA CHAUDHARY)
JUDGE**