

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

**CRR(F)-15-2019 (O&M)
Date of Decision: 15.1.2019**

Vikram Kapoor @ Rinku

.....PETITIONER(s).

VERSUS

Monika and others

.....RESPONDENT(s).

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

Present: Mr. Saurabh Bajaj, Advocate
for the petitioner(s).

RAJ SHEKHAR ATTRI, J.(Oral)

This is a criminal revision petition against the impugned order dated 7.1.2019 passed by learned District Judge (Family Court), Karnal whereby the application filed under Section 311 of Code of Criminal Procedure by the respondent-wife has been allowed and she was recalled to face cross-examination.

In the case in hand, Smt. Monika who is the wife of the petitioner, had preferred an application under Section 125 Cr.P.C. for grant of maintenance allowance for herself as well as for her minor son Paras. Her examination-in-chief was recorded but on that day, her cross-examination could not be conducted due to certain reasons. Thereafter, other witnesses have been examined. Learned Family Court as well as counsel for the petitioner were oblivious of the fact that her cross-

examination has not been conducted, therefore, learned Court closed the evidence. An application was filed by her under Section 311 Cr.P.C. with a prayer for allowing the petitioner to face the cross-examination. Said application was contested and vide impugned order, the same was allowed.

I have heard counsel for the petitioner and gone through the record.

The concept of cross-examination is a part of the fair trial. Its denial will gravely affect the rights of the prosecution as well as the accused. It is well settled that if a witness has not been cross-examined then his evidence cannot be used in evidence against the opponent.

It is apparent from the record of this case that the respondent wife failed to appear in witness box to face cross-examination. If she has not been cross-examined, her evidence shall not be considered. She has deposed for herself as well as for her minor son Paras who is also a respondent in this petition. It will gravely affect the rights of the minor as well as his mother (respondent-wife).

Apart from it, the cross-examination of a witness is necessary for the purpose of fair trial. A Judge while holding a criminal trial cannot be taken as a mere spectator. He cannot be equated with a referee of a game. It is the duty of the Judge to verify as to whether necessary witness has been examined and also as to whether witnesses whose statements have been recorded, completely or partially, have been put to cross-examination. He is the sole judge of the situation.

In the case in hand, it is not disputed that the witness had

appeared so many times and her examination-in-chief has already been recorded, but she did not turn up for her cross-examination. It appears that her cross-examination could not be conducted inadvertently. In this situation, it becomes the duty of the presiding officer to suo-motu call such a witness. In that eventuality, he can take coercive methods to procure the presence of the witness.

In the instant case, it is apparent that learned presiding officer failed to take notice that the cross-examination of said witness could not be conducted. Similarly, counsel for the petitioner also failed to construe that cross-examination has not been conducted. In this view of the matter, it was necessary and in the interest of justice to recall the witness for purpose of cross-examination either by suo-motu or on the application of the complainant by applying the provisions of Section 311 of Cr.P.C. Hon'ble Supreme Court in **P. Sanjeeva Rao v. State of A.P.** 2012(3) RCR (Criminal) 653 has made following observations :

“12. The nature and extent of the power vested in the Courts under [Section 311](#) Cr.P.C. to recall witnesses was examined by this Court in [Hanuman Ram v. The State of Rajasthan & Ors.](#) (2008) 15 SCC 652. This Court held that the object underlying [Section 311](#) was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed:

“ This is a supplementary provision enabling, and in certain circumstances imposing on the

Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of [the Code](#) is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under [the](#)

[Code](#) and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (emphasis supplied)

13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in [Hoffman Andreas v. Inspector of Customs, Amritsar](#) (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of [the Code](#). After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible." (emphasis supplied)

14. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in [Mohanlal Shamji Soni v. Union of India & Anr.](#) 1991 Supp (1) 271, where this Court observed:

"The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or

recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.” (emphasis supplied)

15. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in [Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria](#) through LRs. 2012 (3) SCALE

550. A timely reminder of that solemn duty was given, in the following words:

“What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.”

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than

protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

However, the facts in cases **Pradip Dutta v. State of West Bengal**; 2008(22) RCR (Criminal) 861, **Praveen Jain v. State of Jharkhand**; 2012 (55) RCR (Criminal) 577 and **B.D. Goel v. Ebrahim Haji Husen Sanghani and others**; 2001 ALL MR (Cri) 314 as relied upon by the counsel for the petitioner are distinguishable. In those cases, witnesses were called for further cross-examination, but in the instant case, cross-examination of Smt. Monika-respondent was never conducted.

In view of the above, this Court is of the view that the impugned order does not suffer from any illegality, irregularity and infirmity; and thus, does not warrant interference.

Dismissed.

(**RAJ SHEKHAR ATTRI**)
JUDGE

January 15, 2019
Paritosh Kumar

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>Yes</i>