

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

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**CRM-M-11344-2017
Date of Decision : 05.11.2019**

Randhir Singh

.....Petitioner

Versus

State of Haryana and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Ms. Paramjit Singh Sullar, Advocate
for the petitioner.

Mr. Ramesh Kumar Ambavta, AAG, Haryana
for respondents No.1-State.

Mr. Prem Chand Chaudhary, Advocate
for respondents No.2 to 5.

ARUN KUMAR TYAGI, J. (ORAL)

The petitioner has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for quashing of order dated 07.02.2017 passed in Criminal Revision No.247 of 2016 by the learned Additional Sessions Judge, Ambala whereby order dated 30.11.2016 passed by the learned Additional Chief Judicial Magistrate, Ambala dismissing application under Section 311 of the Cr.P.C. was set aside and application under Section 311 of the Cr.P.C. was allowed.

Pursuant to registration of FIR No.79 dated 14.06.2010, SHO, Police Station Barara, Ambala investigated the case and on completion of investigation charge-sheeted the petitioner-Randhir Singh and his co-accused to face trial for alleged commission of offences punishable under Sections 148, 149, 323, 324, 452 and

506 of the Indian Penal Code, 1860 (for short 'the IPC'). Charges were framed on 04.04.2011. Prosecution witnesses cited in the list of witnesses were examined and prosecution evidence was closed on 02.02.2016. Statements of accused were recorded. Defence evidence was also closed. While the case was fixed for arguments, application under Section 311 of the Cr.P.C. was filed by the prosecution for seeking examination of Dr. Priyanka to prove the Radiological Reports.

The said application was dismissed by learned Additional Chief Judicial Magistrate, Ambala vide order dated 30.11.2016 on the ground that the application, filed at a highly belated stage, being a device to fill up the lacuna could not be allowed and rights of the accused for fair and speedy trial could not be allowed to be defeated due to fault of the prosecution. Aggrieved by the order dated 30.11.2016, the injured filed the Revision Petition against the same which was allowed by learned Additional Sessions Judge, Ambala holding that examination of Dr. Priyanka was necessary and no prejudice would be caused by her examination to the accused who would get opportunity to cross-examine her. The said order has been challenged by the petitioner by filing the present petition under Section 482 of the Cr.P.C..

I have heard arguments addressed by learned Counsel for the petitioner, learned Counsel for the injured and learned State Counsel and have gone through the relevant record.

Learned Counsel for the petitioner has argued that the occurrence took place on 14.06.2010. After giving numerous opportunities, the prosecution closed its evidence on 02.02.2016. When

the case was fixed for arguments, application under Section 311 of the Cr.P.C. was filed at a highly belated stage. Dr. Priyanka was not cited as a witness in the list of prosecution witnesses and could not be allowed to be examined to fill up the lacuna. Therefore, the impugned order suffers from material illegality and the same may be quashed. In support of his arguments learned Counsel for the petitioner has placed reliance on the observations made in judgments rendered by this Court in ***CRM-M-21919 of 2008 titled Harish Kumar and others Vs. State of Haryana and another decided on 18.04.2009 and CRM-M-17282 of 2014 titled Harbinder Singh and others Vs. Jaspal Singh and others decided on 06.01.2015.***

On the other hand, learned Counsel for the injured and learned State Counsel have submitted that Dr. Priyanka was not cited as witness in the list of prosecution witnesses due to oversight. Examination of Dr. Priyanka is necessary for just decision of the case and the same will not amount to filling up of any lacuna. The impugned order does not suffer from any material illegality or irregularity. Therefore, the present petition may be dismissed. In support of their arguments learned Counsel for the injured and learned State Counsel have placed reliance on the observations made by Hon'ble Supreme Court in ***Mohanlal Shamji Soni Vs. Union of India and another: 1991(3) RCR (Criminal) 182; Mannan Sk. and others Vs. State of West Bengal and another : 2014 (4) RCR (Criminal) 617 and Manohar Prajapat Vs. State of Madhya Pradesh : 2014 (6) RCR (Criminal) 163.***

Section 311 of the Cr.P.C. which empowers the Court to

summon material witness or examine person present reads as under:-

“Any court may, at any stage of any inquiry, trial or other proceedings 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 be essential to the just decision of the case.”

In *Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd.* 2008 (4) Criminal Court Cases 162 (Supreme Court) Hon'ble

Supreme Court analyzed the provisions of Section 311 of the Cr.P.C.

as under :-

“7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. 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.

8. 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, enquiries 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 any 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."

It is now well settled that application under section 311 of the Cr.P.C. for summoning of witnesses can be filed at any stage of trial even after final arguments but before the pronouncement of judgment and mere delay is not decisive of the question of summoning of witnesses. In ***Mohan Lal Shamji's Case (Supra)*** it was held 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 the 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 requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

In Shailendra Kumar Vs. State of Bihar : 2002 (1) S.C.C.

655 it was held that a bare reading of section 311 of the Cr.P.C. reveals that it is of very wide amplitude and if there was any negligence, laches or mistake by not examining material witnesses, the court's function to

render just decision by examining such witnesses at any stage is not, in any way, impaired.

In ***Mohanlal Shamji Soni's Case (Supra)*** it was observed by the Hon'ble Supreme Court that the Court while exercising its power under section 311 of the Code of Criminal Procedure, 1973 shall not use such power for filling up the lacuna left by the prosecution. However, in ***Rajendra Prasad Vs. The Naracotic Cell through its Officer-in-charge Delhi : 1999(3) RCR (Criminal) 440*** Hon'ble Supreme Court explained that lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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.

In ***Rajaram Prasad Yadav Vs. State of Bihar and another : 2013(3) R.C.R.(Criminal) 726*** Hon'ble Supreme Court referred to the earlier decisions and in para No.23 of its judgment culled out certain principles which are to be kept in mind while exercising power under Section 311 Cr.P.C. which is reproduced as under:-

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

- 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 needed by the Court for a just decision of a case?

- b) The exercise of the widest discretionary power under Section 311 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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 ***Mannan Sk. and others Vs. State of West Bengal and another : 2014(4) R.C.R.(Criminal) 617*** it was held by Hon'ble Supreme Court that justice must not be allowed to suffer because of the oversight of the prosecution and in that case witness was recalled for examination after 22 years and his examination was also held not to amount to filling of the lacuna.

In the present case, Dr. Priyanka conducted radiological examination of the injured and examination of Dr. Priyanka was necessary to prove the same at the time of recording of prosecution evidence. However, Dr. Priyanka was not cited in the list of prosecution witnesses by the Investigating Officer due to oversight and the omission could not be noticed by the Assistant Public Prosecutor at the time of recording of the prosecution evidence. As observed by Hon'ble Supreme Court in ***Rajendra Prasad's Case (Supra)*** an oversight in the management of the prosecution cannot be treated as irreparable lacuna.

No benefit can be allowed to the accused due to omission of the name of Dr. Priyanka in the list of prosecution witnesses and the prosecution can not be foreclosed from correcting the error/remedying the omission. Examination of Dr. Priyanka is necessary for obtaining proper proof of such facts which will lead to a just and correct decision of the case. No prejudice will be caused to the accused if Dr. Priyanka is allowed to be examined as the accused will be entitled to cross-examine her and also to produce evidence in rebuttal.

As far as, judgments relied upon by the learned Counsel for the petitioner are concerned in ***Harish Kumar's Case (Supra)*** order passed by Additional Sessions Judge allowing framing of additional charge under Section 307 of the IPC was set aside and the said case did not involve any question as to applicability or interpretation of Section 311 of the Cr.P.C. In ***Harbinder Singh's Case (Supra)*** the pre-charge evidence of the complainant was closed by Court order. The wife of the complainant was not cited as a witness nor her MLR was produced on file. It was in these circumstances that the request for examination of wife of the complainant was held to be not permissible on the ground that the same will amount to review of the earlier order closing evidence of the complainant. Therefore, observations in both the judgments relied upon by the learned Counsel for the petitioner are not of any help to the petitioner.

It follows from the above discussion that the impugned order does not suffer from any illegality or irregularity and is not liable to be quashed.

Accordingly, the present petition, being devoid of any merit, is hereby dismissed without any orders as to costs.

05.11.2019
Kothiyal

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No