

IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

Criminal Misc. No.M-39187 of 2018
Date of Decision: 10.05.2019

Bitu B. Masihb

...Petitioner(s)

Versus

State of Punjab

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

Present:- Mr. R.K. Arya, Advocate
for the petitioner.

HARI PAL VERMA, J. (Oral)

Prayer in the present petition filed under Section 482 of the Code of Criminal Procedure, 1973 is for quashing of order dated 22.02.2018 passed by JMIC, Ludhiana in case FIR No.105 dated 28.08.2014 under Sections 323/325/498-A IPC registered at Police Station Jamalpur, District Ludhiana, whereby the application moved by the petitioner under Section 311 CrPC has been dismissed.

As per the averments made in this petition, the petitioner had filed the present application for recalling the witnesses i.e. PW-2 Ritu, PW-4 Ajay Bharti and PW-5 Sonia for their cross-examination. In the application so filed, it has been specifically mentioned that the petitioner

has been falsely implicated in the abovesaid case. Earlier, the petitioner had engaged a counsel for pursuing the matter on his behalf but the said counsel did not pursue the case properly. On number of occasions, the petitioner requested his counsel to track the case properly, but he did not give any satisfactory reply to the petitioner at any point of time. Many times, he did not accompany the petitioner to the Court inspite of his making phone calls. As such, the petitioner has engaged a new counsel Shri Gurpreet Singh Grewal, Advocate, who appeared on behalf of the petitioner on 18.11.2017. He inspected the case on 01.12.2017 and obtained uncertified copies of the proceedings of the case held on 02.12.2017. After going through the proceedings of the case, the newly engaged counsel informed the petitioner that in this case, the opportunity to cross-examine PW-2 Ritu, PW-4 Ajay Bharti and PW-5 Sonia has been declared as nil. The petitioner had no knowledge regarding this fact prior to engaging the new counsel and therefore, necessity arose to file the present application.

However, the said application filed by petitioner under Section 311 CrPC has been dismissed by Judicial Magistrate Ist Class, Ludhiana vide order dated 22.02.2018. Even the revision petition filed against the order dated 22.02.2018 has also been dismissed by learned Additional Sessions Judge, Ludhiana vide order dated 21.08.2018. It is in these circumstances, the petitioner-accused has filed the present petition.

Learned counsel for the petitioner has argued that cross-examination of PW-2 Ritu, PW-4 Ajay Bharti and PW-5 Sonia is required for the just decision of the case and the provisions of Section 311 CrPC

do not provide any limitation on the Court and if the evidence appears to the Court to be essential for the just decision of the Court, the Court can recall or re-examine any witness at any stage. He has relied upon a judgment of this Court in the case of **Rajiv Sood Vs. State of Punjab 2016(1) RCR (Criminal) 67** to contend that by way of application under Section 311 CrPC, if the applicant seeks to recall a witness for further cross-examination, as some important question could not be put to him because of inadvertent mistake on the part of the counsel, no prejudice is likely to be caused to the prosecution in recalling that prosecution witness. Therefore, the present application should have been allowed.

I have heard learned counsel for the petitioner and perused the order dated 22.02.2018.

It will be relevant to reproduce Section 311 CrPC which reads 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”.

Thus, it is evident that under Section 311 CrPC, the Court may summon, any person as a witness, at any stage of any enquiry, trial or other proceedings, if his evidence appears to be essential to the just decision of the case, however, such power, being a discretionary power,

has to be exercised judiciously. In the case in hand, the pleaded ground in this petition is that previous counsel of the petitioner did not appear to cross-examine PW-2 Ritu, PW-4 Ajay Bharti and PW-5 Sonia. However, a perusal of the impugned order shows that PW-2 Ritu has duly been cross-examined. Initially, the cross-examination of PW-2 Ritu was recorded as nil on 02.12.2016, but on the application moved on behalf of the accused, under Section 311 CrPC, which was allowed, PW-2 Ritu was duly cross-examined by the counsel for the accused on 09.06.2017. In this manner, PW-2 Ritu has been examined in the case. As far as PW-4 Ajay Bharti and PW-5 Sonia are concerned, the said witnesses were present for their cross-examination on 24.10.2017, but counsel for the accused did not appear despite having been called several times. Therefore, the contention on behalf of the petitioner that he was not aware of the earlier proceedings, cannot be accepted. Moreover, change of counsel is no ground to recall a witness under Section 311 CrPC.

Hon'ble the Apex Court in the case of **Rajaram Prasad Yadav v. State of Bihar and another** 2013(3) RCR (Criminal) 726 had the occasion to lay down principles to be borne in mind while dealing with application under Section 311 CrPC. The Hon'ble Court was considerably of the view that exercise of such 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 miscarriage of justice. The power under Section 311 CrPC must 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 and

circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and therefore, grant of fair and proper opportunities to the persons concerned must be ensured being a constitutional goal as well as a human right. The observations made by Hon'ble the Apex Court in the case of **Rajaram Prasad Yadav v.**

State of Bihar and another (*supra*), read thus:-

“22. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State), Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

“14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party. The power conferred 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 great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampooranam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)”

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. 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 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 view of the aforesaid observations, no interference is warranted in the impugned order dated 22.02.2018 and 21.08.2018 passed by the Courts below and accordingly, the present petition is dismissed.

May 10, 2019
AK

(HARI PAL VERMA)
JUDGE

Whether speaking / reasoned?

Yes / No

Whether reportable?

Yes / No