

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR No. 8 of 2017

Date of Decision: 09.08.2019.

Sukhjinder Singh

.....Petitioner

Vs.

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: (On the date that judgment was reserved):-

Mr. Amandeep Singh Manaise, Advocate, for the petitioner.

Mr. A.P.S. Gill, D.A.G, Punjab.

AMOL RATTAN SINGH, J.

By this petition, the petitioner challenges the order of the learned trial Court (Sub-Judge, Moga), dated 16.12.2016, by which an application filed by the prosecution under Section 311 of the Cr.P.C., seeking to tender the Chemical Examiners' Report, has been allowed.

2. The contention on behalf of the petitioner, while opposing the application before that Court (as well as before this Court), is that the application has been allowed at a stage when even the petitioners' statement under Section 313 Cr.P.C. has been recorded, and therefore also well after evidence of the prosecution was closed, which was a lacuna that was sought to be filled by the prosecution at too belated a stage.

3. The learned Special Judge however held that though undoubtedly the application had been filed at a very belated stage when the case was fixed for "defence evidence if any" and for arguments, yet, as the document was essential

for the Court to reach a conclusion in the case, jurisdiction under Section 311 could be exercised to allow such evidence to be tendered.

4. Mr. Manaise, learned counsel for the petitioner, argued before this Court that the charge against the petitioner under Section 22 of the NDPS Act, 1985, was framed on 05.01.2013, with the trial thereby initiated; but for more than 3½ years the prosecution did not conclude its evidence, despite various “last opportunities” given to it.

He submitted that evidence of the prosecution was eventually closed vide an order dated 14.10.2016 (copy Annexure P-2), a perusal of which reveals that 27 effective opportunities had been granted (to the prosecution) to conclude its evidence.

He also referred to '*zimini*'/interim orders passed by the trial Court between 16.08.2016 till 12.12.2016, to drive home the point that a large number of opportunities had been granted to the prosecution to conclude its evidence, which not having been concluded even 3½ years later, it had finally been closed vide the aforesaid order dated 14.10.2016 (Annexure P-2).

5. Learned counsel therefore submitted that the prosecution evidence having been closed “by order”, firstly, such closure was never challenged; and secondly, producing the Chemical Examiners' report after the petitioner had disclosed his 'defence', was highly uncalled for, as it would prejudice his case.

He further submitted that in fact even written arguments had been submitted by the petitioner on 05.11.2016, taking therein a plea that the FSL report had not been produced and only thereafter the report was sought to be placed on record by the prosecution, on an application filed under Section 311 Cr.P.C., on 03.12.2016.

6. In support of his argument that evidence cannot be allowed to be led at such a belated stage, when even the statement of the accused under Section 313 Cr.P.C. has been recorded, he relied upon a judgment of two co-ordinate Benches of this Court, in Budh Ram vs. State of Punjab 1996 (2) RCR (Criminal) 270, and Narinder Singh vs. State of Punjab and others 2011 (5) RCR (Criminal) 563.

In the former case, the prosecution had filed an application about 04 days after the statement of the accused was recorded under Section 313 Cr.P.C. (in a trial for the alleged commission of an offence punishable under Section 302 of the IPC).

This Court had held that the application seeking to recall the witness had been typed on 09.05.1995, much prior to the date when the prosecution evidence was closed, with the accused called upon to enter their defence after recording their statements under Section 313 Cr.P.C. However, the application was actually filed thereafter, on 14.07.1995.

Consequently, citing from a judgment of the Supreme Court in Mohd. Iqbal Ahmed vs. State of Andhra Pradesh AIR 1979 SC 677, it was held that recalling of the witness after the accused had already disclosed their evidence, amounts to serious prejudice being cause to them. Hence, the order of the learned trial Court, allowing the application seeking to recall the witness, was set aside.

7. In Narinder Singhs' case (supra) another co-ordinate Bench, vide a short order, held that though undoubtedly the power conferred under Section 311 of the Cr.P.C. enables the Court to summon any person and re-examine any person, yet, the prosecution cannot be allowed to fill in a lacuna in its case and therefore the trial Court had erred in allowing the application seeking to summon another witness as had not been relied upon by the prosecution at the time of

presentation of the '*challan*', even after its evidence had been closed and the accused had also examined a witness in his defence to prove his innocence.

8. *Per contra*, Mr. Ajay Pal Singh Gill, Deputy Advocate General, Punjab, submitted that the Chemical Examiners' report qua the analysis of the contraband seized from the petitioner (as per the case of the prosecution), is a very important document and though, undoubtedly, it should have been presented much before, however, since Chemical Examiners' labs are over-burdened with material to be examined, delay in producing such evidence should not fetter the case of the prosecution.

9. Learned State counsel relied upon a judgment of the Supreme Court in **Rajendra Prasad** vs. **The Narcotic Cell through its Officer-in charge, Delhi** 1999 (3) RCR (Criminal) 440, wherein the following question was framed by their Lordships:-

“Can a trial court permit lacuna in prosecution evidence filed up? The conventional concept is that the court should not do so. But then, what is meant by lacuna in a prosecution case, has to be understood before deciding the said question one way or the other.”

Thereafter, even while referring to an earlier judgment of the Apex Court in **Mohanlal Shamji Soni** vs. **Union of India and another** 1991 (3) RCR (Criminal) 182, it was held [in **Rajendra Prasads**' case (supra)] as follows:-

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under [Section 311](#) of the Code or under [Section 165](#) of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial,

either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition-of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. *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 trail of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can before-closed 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”*

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12. *“We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments, The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at*

The appeal is accordingly dismissed.”

10. In rebuttal, Mr. Manaise submitted that as a matter of fact the report of the Chemical Examiner was in fact dated 25.06.2012, which is well before even the trial had commenced, and consequently, with the written arguments for the petitioner submitted on 03.12.2016, the report could not have been relied upon subsequently at such a belated stage, only to fill in a lacuna, the petitioner having specifically taken the argument that the Chemical Examiners' report had not been presented.

11. Having considered the matter, though, very obviously, with the report of the Chemical Examiner being of a date prior to even the commencement of the trial, it should have been presented to the Court at the initial stage itself, yet, I would not hold the prosecution to late presentation of the report even at a stage after prosecution evidence had been closed and the statement of the accused under Section 313 Cr.P.C. had been recorded, in view of the fact that the said report is obviously a document vital to the outcome of the case, if the trial Court eventually comes to the conclusion that it is a fully reliable report; and it can be validly proved before that Court that the report actually pertains to the contraband stated to have been recovered from the petitioner (accused) and it was only due to negligence/inadvertence, that it was not produced on time.

12. It needs also to be observed that Section 311 of the Code of Criminal Procedure actually is a provision dealing with summoning, examining, recalling and re-examining witnesses and does not specifically refer to production of documentary evidence.

Strictly speaking, the courts' powers to summon any document or to allow production of any documents would be more properly governed by Section 165 of the Evidence Act, 1872; yet, by convention, applications filed seeking production of documentary evidence also are treated to be filed under Section 311

and are allowed/dis-allowed, as per the wisdom of the court under that provision.

In the present case, it is seen that the application itself filed by the prosecution (copy Annexure P-4) dated 03.12.2016, does not invoke either Section 311 of the Cr.P.C. or Section 165 of the Evidence Act, with the reply thereto also on behalf of the petitioner-accused not referring to any specific provision of law in that context.

However, the trial Court most definitely, vide the impugned order, refers to it as an application under Section 311 of the Cr.P.C. and has invoked its jurisdiction to allow the application, also under the said provision.

Be that as it may, procedure being only a hand-maiden of justice, with in any case Section 165 of the Evidence Act empowering the court to call for any document etc. as is considered necessary “to obtain proper proof of relevant facts”, the jurisdiction to do so in any case exists with the trial Court.

In this context, what has been observed in paragraphs 7 and 8 of **Rajendra Prasads'** case (supra) can also be again cited, wherein both, Section 311 of the Cr.P.C and Section 165 of the Evidence Act, have been treated to be provisions on par with each other under which the trial court can exercise such jurisdiction.

13. Coming then to whether or not the petitioner stands prejudiced by allowing the prosecution to produce the FSL report by way of evidence at such a belated stage.

In this context, it must be stated that a perusal of the written arguments submitted before the trial Court by the petitioner-accused (copy Annexure P-3 with the present petition), shows that it is specifically stated in paragraph 5 thereof, that a 'chemical report' bearing no. 223/2012/Toxi./FSL/Pb dated 25.06.2012 was issued, but was not exhibited in the case.

14. In my opinion, other than the fact that a chemical examiners' report in a case under the NDPS Act is a vital piece of evidence that the trial Court should not ignore, even if it is presented at a late stage by the prosecution, with the factum of the existence of such a report not being doubted by the petitioner himself, he having referred to it in detail in his written arguments, that court did not err in allowing the application of the prosecution.

It also needs to be said here that an error made by a party, even the prosecution, whether due to genuine inadvertence or due to any possible conclusion at any stage (though this Court is obviously not making any comment on whether there was collusion or not in the present case), cannot oust the jurisdiction of a court to call for evidence that it considers vital to a just decision in any trial.

15. The judgment cited by learned State counsel in that regard very clearly holds that to be so, with a judgment prior to that, in Jamatraj Kewalji Govani vs. State of Maharashtra AIR 1968 SC 178, also referred to [in Rajendra Prasads' case (supra)].

Undoubtedly, in Budh Ram and Narinder Singhs' cases (supra), this Court (co-ordinate Benches), have held that recalling of witnesses at a very belated stage, after the accused has disclosed his defence, is by way of filling up a lacuna in a prosecution case, which prejudices the case of the accused.

However, in my opinion, the facts of those case are not applicable to the present case, where it is not a witness that has been recalled to fill in a lacuna after disclosure of his defence by the accused, but documentary evidence that was already shown to be existent prior to the disclosure of such defence, as has been allowed to be led by way of evidence by the trial Court, vide the impugned order.

16. Hence, in view of what has been discussed hereinabove, I see no ground to interfere with the impugned order, with the petition therefore dismissed.

However, it is made clear that, firstly, of course nothing stated hereinabove will be taken to be an observation by this Court on even the authenticity or otherwise of the FSL report, as has been allowed to be led by way of evidence by the trial Court, nor shall any observation made hereinabove be treated to be one on the merits of the case for or against the petitioner-accused.

Whether or not the FSL Chemical Examiner report actually pertains to the contraband stated to have been recovered from the petitioner (as per the case of the prosecution), the trial Court would examine wholly on its own merits, including by calling for any 'Road Receipt' etc. pertaining to deposit of the contraband in the Forensic Science Laboratory, if it considers it necessary to do so, keeping in view the fact that the report was produced at such a belated stage.

August 09, 2019
nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes