

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

CRR No. 3633 of 2018

Date of decision :14.08.2019

Kultar Singh

....Appellant

V/s

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE RAJAN GUPTA

Present: Mr. J.S. Bedi, Sr. Advocate with
Mr. Sonpreet Singh, Advocate for the petitioner.

Mr. Gaurav Garg Dhuriwala, Sr. DAG Punjab.

RAJAN GUPTA J.

To appreciate the controversy that has emanated in instant revision petition, it is obligatory to state the facts in brief. Initially, a FIR no. 244/04 was registered against four accused persons, namely, Mohinder Singh, Sabreen Kaur, Palwinderpal Singh and Parminder Kaur @ Babbu under sections 306, 388 of IPC with Police Station 'C' Division, Amritsar and later on during the course of trial, after recording of the statements of the accused under section 313 Cr.P.C. at the stage of defence evidence, DW1 Sarabjit Singh deposed against present petitioner. On the basis of statement of DW1, present petition was summoned as additional accused under section 319 Cr.P.C. along with other co-accused Hardev Singh on 15.01.2016. Thereafter, charges were framed against accused under sections 306/388/506/466/471/119/120-B/201/217 IPC on 20.05.2016. Again, the case was posted for evidence of prosecution.

Now, the nail to be extracted from the doors of this court is that learned trial Judge has now allowed the application of prosecution moved under section 311 Cr.P.C. vide which seven witnesses have been summoned

in the case under reference against the accused persons, out of which only Sarabjit Singh remains to be examined (DW1). The impugned order is dated 21.09.2018.

I have heard learned State counsel and learned counsel for the petitioner at length and have considered their arguments in the legal prism.

With regard to facts of the case and legal intricacies involved therein, this court is to examine two aspects: one, power of court of law to summon witnesses under section 311 Cr.P.C., which query includes the summoning of defence witness as prosecution witness and second, what is the impact of non-recording of statements of these witnesses under section 161 Cr.P.C. by the IO, as they have been summoned for the first time in this case and IO has not arrayed them in the list of witnesses appended with the final report.

Before, commenting upon the legal proposition and the controversy under reference, this court would like to comment upon the role of a Judge in a criminal trial, as observed by Hon'ble Apex court in ***State of Haryana vs. Ram Mehar & ors etc. Criminal Appeal Nos. 805-806 of 2016 @ S.L.P (crl.) Nos. 3278-79 of 2016 decided on August 24, 2016.*** The relevant extract is reproduced as under:-

“19. in Ram Chander vs. State of Haryana, (1981) 3 SCC 191, while speaking about the presiding judge in a criminal trial, D. Chinnappa Reddy, J observed that if a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. The learned Judge reproduced a passage from Sessions Judge, Nellore vs. Intha Ramana Reddy, 1972 Cr LJ 1485, which reads as follows:- “Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge

to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial.

20. While saying so, it has been further held that the Court may actively participate in the trial to elicit the truth and to protect the weak and the innocent and it must, of course, not assume the role of a prosecutor in putting questions.”

Therefore, judicial precedents coupled with bare provisions enshrined under sections 311 Cr.P.C. and 165 of Indian Evidence Act, 1872 make it apparent that Courts of Law are not to act like spectators. These provisions confer vast powers upon the Court to elicit all necessary material on record by playing an active role in collection of evidence. Even if prosecution leaves any leaf unturned, Court can control the proceedings effectively so that the ultimate objective i.e. truth comes out. The court cannot afford to be wishful or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of prosecuting agency (see *Criminal Appeal No. 2044 of 2013 titled as Sister Mina Lalitha Baruwa Vs. State of Orissa & ors., decided on December 5, 2013*)

Also Section 231 Cr.P.C provides the prosecution to lay before the court all material evidence available to it for unfolding its case.

Reverting back to the facts of the present case, it is an undisputed fact on record that being DW1, Sarabjit Singh deposed against the present petitioner and that is why, he was summoned as additional

accused in the present case. Now, when prosecution is asking for permission to examine said witness as its own witness against petitioner and his co-accused, in considered opinion of this court, there is absolutely no harm in it and rather, it is imperative to do so in the given situation as the prosecution of present petitioner has been initiated mainly on the basis of the statement of DW1. Obviously, petitioner will get ample opportunity to cross-examine this witness. Thus to find out the real cause of the death of the deceased persons and to explore the roots of the truth, in the wisdom of this court, learned lower court has rightly applied its mind. In the impugned order, court below has well explained the reasons for summoning said seven additional witnesses and thus, the order does not warrant any interference.

With regard to another point of non-recording of statements of these additional witnesses under section 161 of Cr.P.C., it is observed that a plain reading of section 161 Cr.P.C would show that the investigating officer conducting the investigation under Chapter XII may examine any person acquainted with the facts of the case. As per sub-section (3) of section 161 Cr.P.C, a police officer 'may' reduce into writing any statement made by a witness to him during the course of his examination, and that if he does so shall make a separate and true record of the statement of such person whose statement he records. Section 173(5)(b) Cr.P.C. provides that the statement recorded under section 161 Cr.P.C of all the persons whom the prosecution proposes to examine as witnesses shall be forwarded to the Magistrate along with the final report. It only indicates that if the investigating officer records the statement of any witness, then that statement has to be forwarded to the Magistrate along with the Final Report.

A reading of the provision would show that the legislature had deliberately used the word ‘may’ in the first limb and ‘shall’ in the second limb of sub-section (3) of section 161 Cr.P.C to give the investigating officer a discretion either to record or not to record the statement of any witness whom he questions under this section and proposes to examine as a witness. But a reading of sections 161, 173(5) and section 207 Cr.P.C would reveal that if the statement of any witness is recorded under section 161(3) Cr.P.C by the investigating officer during questioning, it shall be forwarded to the Magistrate and a copy of the statements shall be served to the accused.

Hon’ble Supreme Court in ***Central Bureau of Investigation (CBI) v. R.S.Pai 2002(5) SCC 82*** has held that the word ‘shall’ used in sub section (5) of 173 Cr.P.C cannot be interpreted as mandatory, but as directory. Also, while dealing with the analogous provision under section 173(4) Cr.P.C, 1898, the Hon’ble Supreme Court in *Narayana Rao Vs. State of A.P, (1958) SCR 283 at Page 293* observed that the word ‘shall’ occurring in sub-section (4) of section 173 and sub section (3) of section 207-A is not mandatory, but only directory.

12. **In Best Bakery’s case** (Zahira Habibulla H.Sheikh v. State of Gujarat – AIR 2004 SC 314) the Apex Court held as follows:-

“Sub section (1) of section 161 of the code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the concerned police officer. Sub-section (3) is relevant and it requires the police officer to reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the

part of the police officer to record any statement made to him. He may do so, if he feels it necessary. What is enjoined by the section is a truthful disclosure by the person, who is examined.”

In the present case, it appears that the learned counsel for the petitioner is entertaining an apprehension regarding the prejudice which may likely to be caused to the appellant if the investigating officer has not recorded the statements of the witnesses questioned. In such case, the previous statements of the witnesses will not be available and veracity of the witnesses cannot be tested with reference to their previous statements, is the contention. If that be so, the witnesses examined under section 311 Cr.P.C and the witnesses examined as defence witnesses are also similarly placed and therefore, court is fully entitled to rely upon their evidence. Moreover, trial court shall ascertain the credibility of the witness by applying it judicial mind. The court has to appreciate the evidence of witnesses by taking it as a whole and conclude whether the evidence rendered by the witness is trustworthy or not.

Therefore, as this court finds no legal or valid ground to interfere with the order under challenge. The revision is accordingly dismissed.

(RAJAN GUPTA)
JUDGE

August 14, 2019
Ajay

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