

S.No.269

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

CRM-M-38410 of 2019 (O&M)

Date of Decision:31.10.2019

Kamal KapoorPetitioner

Vs.

State of HaryanaRespondent

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Ms. Baljit Mann, Advocate for the petitioner.

Mr. M.D. Sharma, AAG, Haryana.

Rajbir Sehrawat, J.(Oral)

This is a petition filed under Section 482 Cr.P.C for setting aside the order dated 20.07.2019 passed by the Additional Sessions Judge, Yamuna Nagar at Jagadhri, vide which an application filed by the petitioner under Section 311 Cr.P.C for recalling of PW1 and PW2 for further cross-examination, has been dismissed in a case arising from FIR No.204 dated 15.04.2018 registered under Sections 27, 29, 54, 59 of Arms Act, 1959 and Section 302 and 201 IPC at Police Station City Yamuna Nagar, District Yamuna Nagar.

The facts giving rise to the present petition are that the petitioner is an accused in a trial for an offence under Section 302 IPC; on the allegations of having killed Pinki, who was the sister of PW1 Raju and mother of PW2 Tina. The prosecution had examined their witnesses, including the abovesaid PW1 and PW2. These two witnesses were even cross-examined by the defence. However, after the cross-examination of these witnesses was closed, on the next date of hearing, the petitioner had moved an application under Section 311 Cr.P.C for recalling of these two witnesses for their further cross-examination. That application has been declined by the trial Court. It is against that order that the present petition has been filed.

Arguing for the petitioner, learned counsel has submitted that the petitioner has never been lacking in diligently conducting the proceedings on his behalf. It is further submitted that there were 14 witnesses from the side of the prosecution. The petitioner had cross-examined all those witnesses on the same day when they were examined by the prosecution. It is submitted that even PW1 and PW2 were cross-examined by the counsel on the same day when they were produced, i.e. 30.10.2018. However, counsel for the petitioner was not feeling well on the said date, due to illness. The case was adjourned for 11.12.2018. It is on that date, the counsel for the petitioner realised that certain material cross questions regarding some of the evidence, which have been led against the petitioner, have not been put to the witnesses. The questions which are required to be put to the witnesses are regarding the CCTV footage of the alleged incident; as well as; qua the spot recoveries. Hence, these questions are of utmost importance for the defence of the petitioner. Accordingly, the application was moved by the petitioner for recalling of the above-said two witnesses for their further cross-examination. However, the same has wrongly been declined by the Court below; even without considering the fact whether these questions were relevant for the just decision of the case or not.

On the other hand, learned State Counsel has referred to the reply filed by the State and has submitted that the order has rightly been passed by the Court below. The petitioner is seeking to fill up the lacunae in his defence. The petitioner was granted enough time to cross-examine the above-said witnesses. The petitioner had actually cross-examined at length

both these witnesses. Even on the point of CCTV footage, questions were put to them during cross-examination. Therefore, the application moved by the petitioner was nothing but an attempt to prolong the matter as much as he can. Therefore, dismissal of the present petition is prayed for.

Having heard learned counsel for the parties and having perused the case file, this Court find substance in the argument of the learned counsel for the petitioner. No doubt, the petitioner had been granted opportunity to cross-examine the above-said witnesses. It is also not in dispute that even the questions regarding the CCTV footage have been put to these witnesses. However, this Court finds substance in the argument of the learned counsel for the petitioner that on the same day, the counsel for the petitioner had to cross-examine four prosecution witnesses; including the above-said two witnesses, at one go. Therefore, certain questions; which might be required to be put to the above-said two witnesses may not have been put up. Even the counsel for the petitioner has come forward with his explanation that he was not feeling well on the said date, thereby diminishing his capability.

Assuming that the counsel was not ill, it cannot be ruled out that when a counsel is cross-examining four prosecution witnesses in a murder case, certain questions, which could be relevant for the defence of the accused, could be overlooked by inadvertence. Hence, the accused, who is facing the trial for an offence which can invite him the most severe punishment, deserves to be granted opportunity to defend himself to the maximum extent, lest he should have a grievance, even if such grievance is mistaken that he has not been granted proper opportunity to defend himself.

It has been recorded by the Court below and has been so argued by the counsel for the State as well, that the accused is trying to fill up the lacunae in his defence. However, this argument is totally misconceived. There can never be an argument against the accused that he is trying to fill up the lacunae in his defence. The concept of filling up of lacunae, at the best, can be raised only against the prosecution. The accused in the trial has every right to probablise his defence, by asking all the relevant questions. Not only that, the Evidence Act permits even the irrelevant questions to be asked by an accused; provided they are pertaining to the relevant facts. An accused can take advantage of lacunae left in the evidence of the prosecution because the prosecution is to prove its case beyond reasonable doubt, however, the prosecution cannot be permitted to rely upon and take advantage of a supposed lacunae in the defence of the accused. This deserves to be kept in mind that the accused has a right to even remain silent, unless put under obligation to speak out, during the trial. But he cannot be convicted only because of the fact that he has left total lacunae in his defence by not leading any evidence. The prosecution has to stand on its own legs. Hence, this Court does not find any substance in the submission made by the counsel for the State; and the reason recorded by the Court below; that the accused is trying to fill up the lacunae in his defence.

The other argument raised by the learned State Counsel that the petitioner is trying to delay the trial is also not substantiated from the facts on the file. As submitted by counsel for the petitioner, the petitioner has not sought any date for cross-examination of any prosecution witnesses or any adjournment for cross-examination of any one of the witnesses. Even the

present application was moved by the petitioner on the very next date after the cross-examination of the above-said witnesses was completed in the first instance. Therefore, this Court does not find any delaying tactics on the part of the petitioner/ accused. Accordingly, the petitioner deserves to be granted an opportunity to cross-examine the above-said witnesses, as prayed for by him.

However, since the petitioner has cross-examined the said witnesses, at least once, therefore, the petitioner can also not be granted infinite time for carrying on the cross-examination of the above-said witnesses. Therefore, the petitioner has to restrict to only one opportunity for cross-examining the said witnesses.

In view of the above, the present petition is allowed. The trial Court is directed to grant one effective opportunity to the petitioner to cross-examine the above-said witnesses.

October 31, 2019
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(RAJBIR SEHRAWAT)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No