

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-46160-2018 (O&M)
Date of decision: 18.07.2019

Brig (Retd.) Arun Kaistha

....Petitioner

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. J.S. Mehndiratta, Advocate
for the petitioner.

Mr. Joginder Pal Ratra, DAG, Punjab.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this petition is for setting aside the order dated 19.03.2018 (Annexure P-9) passed by the trial Court in FIR No.50 dated 21.03.2015 under Section 302 of the Indian Penal Code (for short 'IPC'), Police Station Division No.1, Pathankot, vide which an application filed by the petitioner under Section 311 of the Code of Criminal Procedure (for short 'Cr.P.C.'), for recalling PW5 Dr. M.L. Attri, for further cross-examination, was dismissed.

Brief facts of the case are that the aforesaid FIR was registered by complainant Ratesh Bakshi with the allegations that on 20.03.2015 at about 11.00 pm, he along with his wife Kamli Sharma and 07 years old son,

were going in a car bearing registration No.JK-02B-B-6258-T towards Simbol Chowk, Pathankot. When they reached in front of a school on Dalhousie Road, Pathankot, a car bearing registration No.HR26-AR-6889, in which three persons were sitting, suddenly stopped in front of his car and stated that he is trying to escape after hitting side of the car and started giving beatings to him. His wife Kamli Sharma came to the rescue and one more person Anil Kapoor also came to his rescue and thereafter, aforesaid three persons started giving beatings to Anil Kapoor as well. He fell down on the road and died at the spot. In the meantime, people gathered and apprehended these three persons, whose names are Arjun Kaistha (petitioner), Rahul Palak and Arun Kaistha. The FIR was registered with the allegations that these three persons have caused injuries to him.

After presentation of the challan, charges were framed under Section 302 IPC. The police recorded statements of the prosecution witnesses and in that process, statement of PW5 Dr. M.L. Attri was recorded by way of video conferencing.

During cross-examination of PW5, a question was put by prosecution in re-examination whether deceased Anil Kapoor suffered injuries on chest, after suffering hurt attack or due to fall on hard surface, to which this witness relied that his opinion was not definite but as per his opinion, such possibility can be there.

Learned counsel for the petitioner has stated that as per the post-mortem report, cause of death was sudden cardiac arrest due to acute myocardial infarction precipitated by blunt trauma to chest. It is further

submitted that as the petitioner-accused is a serving Army personnel, on basis of the entire evidence collected during the court of inquiry, the accused was not held guilty, the petitioner moved an application for summoning the record of court of inquiry file from Commander 16 (Independent) Armoured Brigade, Mamoon Cantt. The trial Court, while deciding the application under Section 311 Cr.P.C., held that the accused cannot be permitted to produce on record the defence evidence till the time, such stage reaches and therefore, the application was dismissed.

Learned counsel for the petitioner submits that the trial Court granted permission to the petitioner to obtain the copies of the Court of inquiry for the purpose of conducting effective cross-examination of ASI Chamba Singh, who was present on the date of passing of the order dated 08.08.2017, subject to decision of case, if such inquiry report is admissible. It is further submitted that thereafter, the petitioner moved an application under Section 311 Cr.P.C. for production in Court the original PMR bearing No.PMR/5/ML/L/RK/15/CHPTK of deceased Anil Kapoor and for further cross-examination of PW5 Dr. M.L. Attri, Medical Officer, Civil Hospital, Pathankot, to prove that there is fabrication in the original post-mortem report and therefore, the original hand-written post-mortem report could not be produced in the Court, as the statement of this witness was recorded through video conferencing. Another application was filed praying for issuance of direction to SMO, Civil Hospital, Pathankot to produce the original mortuary register w.e.f. 15.01.2015 including its pages from 03.03.2015 to 26.03.2015 with a plea that PW5 was examined regarding

post-mortem examination on the dead body of Anil Kapoor and from the record of the Army e-file, it came to the notice of the accused that first page of the mortuary register and in the pages containing entries w.e.f. 03.03.2015 to 26.03.2015, there is no entry regarding dead body of Anil Kapoor, which also shows that there is fabrication in the record and PW5 has made a statement on the basis of some bogus register.

The prosecution contested these applications and stated that the petitioner-accused has conducted the cross-examination of this witness at length and there is no fabrication on the part of PW5 Dr. M.L. Attri, as he has made a statement as per the available record and prayed for dismissal of the applications. Thereafter, the trial Court partly allowed first application and dismissed for summoning post-mortem register and further dismissed second application vide impugned order dated 19.03.2018. The operative part of the order dated 27.02.2018 reads as under: -

“Now the court deals with the two sets of document. First set of document is postmortem register for which the evidence is already complete. The witnesses have been examined. All possible question regarding the fabrication, interpolations have been put to the witnesses. I agree with the contentions raised by the learned Additional Public Prosecutor that once the witness has been examined regarding a document which is prepared in triplicate and the state maintains a record in due course and the said postmortem registers are prepared and maintained by the government doctor in due course of business

and it contains in continuity the different postmortems conducted by different doctors and the witnesses have been examined, all the possible questions have been put, there is no purpose of holding a trial within a trial. If such like applications are allowed, it will amount to appreciating each and every witness after the witness is examined to see the value of the statement, the benefit the prosecution has got or prejudice caused to the witness, it is not required to be so done. I agree with the contentions of the learned Additional Public Prosecutor further that the original carbon copy prepared in the same process which was on judicial file was never shown to the witness through video conferencing vis a vis the register which he was keeping where the first page is still lying intact. Therefore part of the first application for production of the postmortem register is declined. However direction is passed on to the SMO concerned to preserve the said postmortem register in his custody leaving the liberty with the accused/ applicants to seek the production of the same as and when required before any doctor is examined regarding the postmortem conducted on the dead body and as far as the dead house register is concerned, this court is of the opinion that it is a relevant piece of document which is necessary for the just decision of the case. The condition of the dead body immediately it was declared as brought dead by the doctor,

whether the dead body was retained in the dead house or was taken away by the relatives of the deceased is a matter which has been agitated by the counsel for the accused and there are also certain documents on file even produced by the prosecution which goes to show that there might be such possibility. Therefore the application is partly allowed and the said dead house register is summoned and the application for the purpose is allowed. The SMO is directed to produce the said register in the court.”

Learned counsel for the petitioner has argued that once the trial Court has issued a direction to the SMO, Civil Hospital, Pathankot to preserve the post-mortem report in his custody, granting liberty to the petitioner to produce the same during his defence evidence and further granted liberty to examine PW5 in his defence, the Court has formed an opinion that these two documents i.e. original post-mortem report and the register of the dead house, in which there are allegations of interpolation, are necessary documents and they can be put to PW5 and therefore, instead of allowing the petitioner to recross-examine this witness, he can produce this witness again in his defence, will create complicity, as in case of cross-examination, the petitioner can put leading questions to PW5, whereas he cannot do so, if he examines the same witness in his defence and in that manner, he will not be able to effectively prove the allegations of interpolation in the record.

Learned counsel has further argued that on the basis of post-

mortem report, at the initial stage, the police has submitted a cancellation report, however, on the protest of the complainant, cognizance was taken by the Court and charges were framed and therefore, the petitioner could not effectively cross-examine PW5 by confronting him with the original post-mortem report, where interpolation is there and also could not confront him with the dead house register, being relevant piece of evidence.

Learned counsel has relied upon **Vijay Kumar Vs. State of U.P. and another, 2011 (4) RCR (Criminal) 208**, wherein the Hon'ble Supreme Court has held as under: -

“ Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason. ”

Learned counsel has further relied upon **AG Vs. Shiv Kumar Yadav and another, 2015 (4) RCR (Criminal) 312**, wherein the Hon'ble

Supreme Court has held as under: -

“In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

“13. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

“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.”

Section 138, Evidence Act

“138. Order of examinations.—Witnesses shall be first examined-in-chief then (if the adverse party so desires)

cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—*The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”*

14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the

court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re- examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily

consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re- examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

“17.1. 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?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under Section 311 CrPC 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.

17.5. 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. 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.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. 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.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, 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.

17.11. 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.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. 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.

17.14. The power under Section 311 CrPC 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.”

Learned counsel has also relied upon a judgment of the Hon’ble Supreme Court in **Manju Devi Vs. State of Rajasthan and another, 2019 (2) Apex Court Judgments (SC) 191**, to argue that it has been held that discretionary powers under Section 311 Cr.P.C. are essentially intended to ensure that every necessary measure is taken by Court to clear any ambiguity in so far as evidence is concerned and also to ensure that no prejudice is caused to anyone.

It is further argued that re-examination of PW5 is necessary, as the petitioner-accused, in order to prove his innocence, could not properly conduct the cross-examination through video conferencing, as he had no opportunity to confront this witness with the original post-mortem report (*in*

which, according to the petitioner, there is interpolation) and also the dead house register.

In reply, learned State counsel, on the basis of affidavit of DSP, City, Pathankot dated 15.02.2019, has submitted that the trial Court has passed a well reasoned order and it will be open for the petitioner to recall PW5, when he lead his defence evidence, which he want to produce and prove by examining this witness. It is further submitted that the record of dead house has no relevance with PW5 and he was cross-examined at length, as original post-mortem report is part of the report under Section 173 Cr.P.C. It is also submitted that the application has been moved just to delay disposal of the trial and prayed for dismissal of the present petition.

After hearing learned counsel for the parties, I find merit in the present petition.

It is undisputed that the statement was recorded by way of video conferencing and in such event, putting a specific question about interpolation in the post-mortem report, by showing the original record to PW5, was not effective. A perusal of the cross-examination further shows that after the statement of PW5 was recorded, on a request made by the Public Prosecutor, this witness was recalled and a specific question, as noticed above, was permitted to be asked by the Assistant Public Prosecutor and therefore, though an opportunity was given to the accused for further cross-examination and no question was asked, however, in my opinion, to clarify the objection raised by the petitioner regarding the interpolation in the medical record, PW5 Dr. M.L. Attri can be recalled, in the interest of

justice, in view of judgments of the Hon'ble Supreme Court in **Vijay Kumar's** case (supra), **AG's** case (supra) and **Manju Devi's** case (supra).

Accordingly, this petition is allowed and the impugned order dated 19.03.2018 (Annexure P-9) passed by the trial Court is set aside. The trial Court is directed to grant one opportunity to the petitioner-accused to further cross-examine PW5 Dr. M.L. Attri. The trial Court will fix a date for further cross-examination of this witness.

Since a specific objection is raised by the petitioner that he wants to put the aforesaid original documents i.e. post-mortem report and dead house register, to PW5 Dr. M.L. Attri, the trial Court will make an endeavour to call this witness in person.

The parties are directed to appear before the trial Court on or before 05.08.2019.

With the aforesaid observations and directions, present petition stands disposed of.

[ARVIND SINGH SANGWAN]
JUDGE

18.07.2019
vishnu

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