

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

125

CRM-M-2702-2021

Date of decision: 05.04.2021

Khalid @ Khalli

.....Petitioner

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Gautam Dutt, Advocate
for the petitioner.

Mr. Ranvir Singh Arya, Addl. A.G., Haryana
for the respondent-State.

ARUN KUMAR TYAGI, J. (ORAL)

1. The petitioner has filed present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.") for quashing of order dated 10.12.2020 passed by learned Additional Sessions Judge, Mewat in Sessions Case No.554 of 2018 titled as 'State Vs. Khalid @ Khalli' FIR No.147 dated 03.09.2018 registered under Sections 148 and 302 read with Section 149 of the Indian Penal Code, 1860 (for short, "the IPC") and Section 25 of the Arms Act, 1959 at Police Station Bichhor, whereby the application filed by the petitioner under Section 311 of the Cr.P.C. for summoning of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal was dismissed.

2. Briefly stated, the facts giving rise to the filing of the present petition are that on 02.09.2018, Aadil and Aleem brothers of complainant-Aamil Rasid @ Azad and accused Khalid and Subin went to Village Rai for playing volleyball match. Amount of Rs.4,900/- had

been collected which was to be paid on decision of the match to the winning team. The amount was entrusted to accused Khalid. They lost the match and his brother Aadil asked accused Khalid to pay the amount of Rs.4,900/- to Rai team but accused Khalid did not give the money and accused Khalid and Subin abused and intimidated his brothers. In the night at about 09:00 P.M., Yasin, Ayyub and Subin and 2-3 other unknown persons armed with batons in their hands and Khalid armed with pistol came and encircled him and other family members. Yasin asked accused Khalid to shoot him and accused Khalid fired a shot from pistol which he was carrying which hit him in the left side of his stomach. Initially the FIR was registered under Sections 148, 307 read with Section 149 of the IPC and Section 25 of the Arms Act, 1959 and on death of complainant Aamil Rasid @ Azad, Section 302 of the IPC was added. The police investigated the case and on completion of investigation, charge-sheeted accused Khalid. During trial, the Public Prosecutor tendered in evidence the report of the Ballistic Expert as Ex.PX. Subsequently, the petitioner filed application under Section 311 of the Cr.P.C. for summoning the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal for cross-examination. The application was dismissed by learned Additional Sessions Judge, Mewat vide impugned order dated 10.12.2020 on the ground that examination of the Ballistic Expert was not required for just decision of the present case.

3. Feeling aggrieved, the petitioner has filed the present petition.

4. The petition has been opposed by the respondent-State in

terms of reply filed by way of affidavit of Shamsheer Singh, HPS, Deputy Superintendent of Police, Punhana, District Nuh.

5. I have heard arguments addressed by learned Counsel for the petitioner and learned State Counsel and gone through the material placed on record.

6. Learned Counsel for the petitioner has submitted that the occurrence took place on 02.09.2018, FIR was registered on 03.09.2018 and sample was sent to FSL on 03.10.2018 and there was hardly any possibility of deformation/mutilation of the bullet within this short period when the parcels remained sealed. If the bullet was the same which was fired and taken out from the body of the deceased then why blood was not found on it and threads sent along with it in sealed parcel for examination to FSL. Cross-examination of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal is necessary for just decision of the case. The application has been wrongly dismissed. Therefore, the petition may be allowed, impugned order dated 10.12.2020 may be set aside and the petitioner may be allowed to cross-examine the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal with respect to the above said points.

7. On the other hand, learned State Counsel has argued that report of the Ballistic Expert is admissible per se. The petitioner does not have any right to cross-examine the Ballistic Expert. The petitioner filed the application after expiry of more than one year just to fill up the lacuna. The application has been rightly dismissed by learned Additional Sessions Judge, Mewat. The impugned order does not suffer

from any illegality. Therefore, the petition may be dismissed.

8. Section 293 of the Cr.P.C. makes reports of certain Government Scientific Experts to be per se admissible in evidence and permits the same to be used as evidence in any inquiry, trial or other proceedings under the Cr.P.C. The same reads as under:-

“293. Reports of certain Government scientific experts.-*(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.*

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Inspector of- Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.”

9. Section 293 of the Cr.P.C. leaves the question of examination of the expert entirely to the discretion of the Court if the report is based on observations which justify his conclusion the Court may refuse to examine the expert even though it has been sought for by either party. But the Court may summon the expert for examination if

any doubt arises in the mind of the Court out of the report. If the accused wants to challenge the report he has to submit an application to the trial Court pointing out in what respect the report was deficient and necessitated the calling of the expert examination.

10. Section 311 of the Cr.P.C. empowers the Court to summon and examine material witness or examine any person present and recall and re-examine any person already examined. The same 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."

11. In ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd. : 2008 (4) Criminal Court Cases 162 (Supreme Court)*** Hon'ble Supreme Court observed as under :-

"7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court

to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

12. In ***Mannan Sk. and others Vs. State of West Bengal and another*** : ***2014(4) R.C.R.(Criminal) 617*** Hon'ble Supreme Court observed as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just

decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

11. Rather than referring to all the judgments which are cited before us, we would concentrate on Mohanlal Soni which takes into consideration relevant judgments on the scope of Section 311 and lays down the principles. Mohanlal Soni is followed in all subsequent judgments. In Mohanlal Soni this Court was considered the scope of Section 540 of the Code of Criminal Procedure, 1898 (the old code) which is similar to Section 311 of the Code. This Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. The relevant observations of this Court are as under:

".....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

This Court further observed as under :-

"..... Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the

principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

12. While dealing with Section 311 of the Code in *Rajendra Prasad* this Court explained what is lacuna in the prosecution as under :

"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 trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed 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."

13. Reference must also be made to the observations of this Court in ***Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors., 2004(2) RCR (Criminal) 836 : (2004) 4 SCC 158*** where this Court described the scope of Section 311 of the Code as under :

"Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the

prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.””

13. In the present case the petitioner filed the application seeking summoning of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal for cross-examination on the grounds of claimed deficiencies requiring clarifications regarding deformation/mutilation of bullet and absence of blood marks on the bullet. The petitioner could not file the application for summoning of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal at the time of tendering of the report in prosecution evidence as the petitioner claims to have come to know about the deficiencies in the report at later stage. The application could not be dismissed on the ground of delay and the petitioner cannot be barred from remedying the omission on the ground of filling up of the lacuna. In view of the facts and circumstances of the case and also duty of the Court to discover the truth, summoning of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal for cross-examination is essential for explaining the claimed deficiencies which will also be essential for just decision of the case. The Court has to be magnanimous in permitting such omissions to be remedied. No prejudice will be caused to the prosecution as the prosecution will be entitled to re-examine the witness in case any new facts and circumstances emerge during his cross-examination.

14. In view of the facts and circumstances of the case and the above referred judicial precedents, the petition is allowed, the

impugned order dated 10.12.2020 passed by learned Additional Sessions Judge, Mewat is set aside, the application under Section 311 of the Cr.P.C. is allowed and the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal is ordered to be summoned for cross-examination subject to payment of such amount as may be assessed by learned Additional Sessions Judge, Mewat, as expenses to him. However, the petitioner will be given only one effective opportunity for cross-examination of the Assistant Director, Ballistic, Forensic Science Laboratory, Madhuban, District Karnal.

15. A copy of this order be sent to learned District and Sessions Judge, Mewat for forwarding the same to the Court concerned for ensuring requisite compliance with the order.

05.04.2021

Vinay

**(ARUN KUMAR TYAGI)
JUDGE**

Whether speaking/reasoned : Yes
Whether reportable : Yes