

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

(Heard through VC)

CRR No.1469 of 2021 (O&M)

Date of Decision: November 22, 2021

Satish @ Kala

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Vinod Ghai, Senior Advocate with
Ms. Kanika Ahuja, Advocate
for the petitioner.

JAISHREE THAKUR, J. (Oral)

The instant criminal revision has been filed seeking to challenge the impugned order dated 12.11.2021 passed by the trial court whereby, the application filed by the petitioner-accused along with his other companions under Section 311 Cr.P.C. stands dismissed.

Learned senior counsel appearing on behalf of the petitioner herein would contend that the petitioner herein has been nominated as an accused in FIR No.5 dated 03.01.2017, registered under Sections 147, 148, 149, 323, 449, 302, 452, 120-B, 216 of the Indian Penal Code and Section 25 of Arms Act at Police Station Sadar Dadri, District Charkhi Dadri. It is contended that complainant-Preet Singh got the aforesaid FIR registered wherein, it was stated that Ankit r/o village Fatehgarh came to his home along with one another boy of village Dhani Phogat, asking for his son

Satinder. When they were informed that his son was there, then Ankit remained sitting there and the other boy accompanying him went outside and called many other boys namely Pardeep Kasni, Satish Nimli, Pawan r/o Bound, Satish @ Kala r/o Dubaldhan, Sethi r/o Charkhi and Kodh r/o Rawaldhi, Master Vikash r/o Fatehgarh and Satish r/o Sahuwas. It is submitted that complainant went to call his son and when he came out, the aforesaid persons started indiscriminate firing on his son Satinder who died. When his daughter Munesh came to save him, she was also inflicted injuries. Counsel for the petitioner herein contends that document Annexure P-5 has now come into the possession of the petitioner, in which the complainant had earlier stated that two unknown persons, aged 45/48 years came to his house and opened fire upon his son, which statement is different from the version as set out in the FIR. As this document was unavailable earlier, therefore, he would seek an opportunity to recall the witnesses PW1-Preet Singh, PW2-Munesh and PW3-Sanjay, who stand examined and put the said document to them. It is argued that Section 311 Cr.P.C. permits recalling of witness at any stage of the case and there are several judgments, which allow recalling of witnesses even before the final judgment has been pronounced.

Notice of motion.

At this stage, Mr. Kuldeep Tiwari, Addl. AG Haryana, who is appearing through the medium of video conferencing, accepts notice on behalf of respondent No.1-State and opposes the instant criminal revision by contending that the application filed is vague as no details have been given in the application filed under Section 311 Cr.P.C. as to when and how the

petitioner came to be in possession of Annexure P-5. It is argued that the said document is not a part of the challan and, therefore, the authenticity of the said document cannot be established. It is argued that material witnesses already stand cross-examined at length as far back as 2018 wherein, a specific question has been put to them regarding the mentioning of name of the accused in the FIR. Therefore, there is no ground to recall the witnesses already examined, as the trial is being delayed.

Mr. Vikrant Rana, Advocate puts an appearance on behalf of complainant-respondent No.2 and files the power of attorney, which is taken on record. He very fairly submits that even though testimony of the complainant and other material witnesses has been recorded as far back as 2018, he would have no objection in case, one effective opportunity is allowed to the petitioner to recall PW1 to PW3. It is submitted that even before the trial court, no objection had been given to re-examine PW1 to PW3.

I have heard learned counsel for the parties, apart from perusing the pleadings of the case.

The learned trial court, by the impugned order dated 12.11.2021, while dismissing the application moved by the petitioner under Section 311 Cr.P.C. has observed as under;-

“In the present case, a perusal of the testimonies of aforesaid witnesses namely PW1 Preet Singh, PW2 Munesh and PW3 Sanjay would reveal that these witnesses have been cross-examined at length by the defence side. At this stage, when the evidence of the prosecution has already been concluded and the case

was fixed for recording the statements of the accused under Section 313 Cr.P.C., then there is no need to recall the aforesaid witnesses simply because the applicants-accused allege that on account of some inadvertence on their part or on account of non-availability of any document with them on a previous occasion, they could not effectively cross-examine the aforesaid witnesses..... ”

Section 311 Cr.P.C. details with the power of the court to summon material witness, or examine person present, which 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.”

The touchstone for exercise of powers under Section 311 Cr.P.C. is the satisfaction of the court that the evidence of any person, which comes to its notice, is essential for the just decision of the case. This power, under Section 311 Cr.P.C. can be exercised by the court at any stage of any inquiry, trial or other proceedings under the Code, to summon any person as witness, examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined. The intention of the Legislature is to empower and enable the court to come to a correct finding and for that reason, the court would be fully justified in permitting

production of evidence whether documentary or oral. The cause of justice is paramount and no impediment has, therefore, been intentionally put on the court by the Legislature to exercise the powers under Section 311 Cr.P.C.

In the case of ***Rajender Parsad vs. Narcotic Cell, Delhi, 1999***

(3) RCR (Criminal) 440, the Apex Court while dealing with the provisions of Section 311 Cr.P.C. observed as under;

“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 latches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

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 fore-close 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.”

A perusal of the observations given by the trial court reveals that the main reason for declining the application was that the petitioner herein had already cross-examined the said witnesses at length and the case was fixed for recording the statement of accused persons under Section 313 Cr.P.C. In other words, instead of deciding the basic question whether the document sought to be produced by the petitioner is essential to the just decision of the case or not, the trial court went into the question that the said prosecution witnesses have already been cross-examined and the case is now fixed for recording the statement of accused under Section 313 Cr.P.C., as such, there is no need to recall the said witnesses.

A contention has been raised by learned counsel for the respondent-State that the document sought to be produced on record by the petitioner is not the part of the challan, however, the argument raised is not sustainable. It is settled proposition of law that mere production of document does not mean that the document produced or exhibited stand proved. Section 3 of the Indian Evidence Act, very clearly interprets the expression of the terms used as “***proved***” “***disproved***” and “***unproved***” in the said Act. In other words, if the petitioner is permitted to recall the said witnesses to put Annexure P-5 to them, this would have to be exhibited or proved as per the provisions of the Indian Evidence Act. Moreover, it cannot be said that by moving the application under Section 311 Cr.P.C. the

petitioner accused are trying to delay the trial of the case, as only two accused are on bail in this case and the remaining five accused are in custody. Furthermore, counsel for complainant-respondent No.2 has no objection, in case the instant revision petition is allowed. Under these circumstances, this court is of the considered view that the document sought to be put to the aforesaid witnesses by the petitioner is essential for the decision of the case.

In view of the foregoing discussion and ratio of law as well as no objection given by counsel for complainant-respondent No.2, the criminal revision in hand is allowed and the impugned order is hereby set aside.

The matter is stated to be listed before the trial court on 23.11.2021, as such, the trial court is directed to adjourn the case for 29.11.2021 or any other date convenient to it. The trial court shall summon PW1 to PW3 for any other suitable date and only one effective opportunity shall be allowed to the accused persons to re-examine the said witnesses only qua Annexure P-5.

It is made clear that anything observed or said by this court while deciding the instant petition shall have no effect on the merits of the case.

November 22, 2021

vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No