

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

203

CRM-M-29454-2017 (O&M)

Reserved on : 27.04.2022

Pronounced on:30/05/2022

SATISH

....Petitioner

Versus

STATE OF HARYANA AND ANOTHER

...Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Argued by : Mr. Aman Dhir, Advocate
for the petitioner.

Mr. Kanwar Sanjiv Kumar, AAG Haryana.

Mr. Ajay Ghanghas, Advocate for
Mr. Vikrant Hooda, Advocate
for respondent No.2.

VINOD S. BHARDWAJ. J.

The present petition invokes the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for raising a challenge to the order dated 14.07.2017 (Annexure P-6) passed by Judicial Magistrate First Class, Bahadurgarh, District Jhajjar, whereby the application under Section 246(6) and 311 CrPC filed by respondent No.2-complainant has been allowed in criminal complaint No.526 dated 19.11.2012 titled as 'Sunil Vs. Rati Ram and Others'.

2. Before advertng to the merits of the case, bare facts as are necessary to be taken into consideration are that respondent No.2-complainant filed an application under Section 156(3) CrPC before the Judicial Magistrate First Class Bahadurgarh, District Jhajjar. The said application was treated as a complaint case under Sections 323, 324, 506 and 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'). The respondent No.2-complainant led preliminary evidence

examining three witnesses including himself. Thereafter, the preliminary evidence was closed on behalf of respondent No.2-complaint on 06.12.2008. The petitioner along with other co-accused was summoned to face trial for commission of the said offences vide order dated 28.08.2010 (Annexure P-2). Subsequently, pre-charge evidence was led by respondent No.2-complainant wherein the same 3 witnesses were examined again and upon consideration thereof charge under Section 323 IPC read with Section 34 IPC and Section 506 IPC was framed vide order dated 03.01.2014 (Annexure P-3). The counsel appearing on behalf of respondent No.2-complainant made a statement before the trial Court that the evidence led by him at the stage of pre-charge evidence may be read as part of the evidence after-charge. Counsel for the petitioner also made a statement that the cross examination already held at the pre-charge stage may also be considered to have been conducted as after-charge evidence. Resultantly, the evidence of the complainant was closed by the trial Court. Respondent No.2-complainant thereafter preferred an application under Section 246(6) CrPC read with Section 311 CrPC for examining additional evidence on the ground that the procedure prescribed in the Code of Criminal Procedure, 1973 has not been followed and that the complainant has a right to examine the remaining witnesses under Section 246(6) CrPC. The witnesses that the respondent No.2-complainant sought to examine are:-

1. Vikas son of Jiwan Lal
2. Bittu son of Jawala Prasad
3. Tilak Raj son of Jawala Prasad
4. Naresh son of Tara Chand

3. The aforesaid application was allowed by the trial Court vide order dated 14.07.2017 (Annexure P-6) and the said order is assailed in the present

petition to have been passed illegally and without appreciating the statutory provision as well as the prejudice which is occasioned to the petitioner-accused.

4. Learned counsel appearing on behalf of the petitioner has argued that the trial Court has failed appreciate that the evidence of the parties was closed on a statement made by the counsel and that the said order was never challenged by either of the parties. Furthermore, the case was already fixed for defence evidence and that statement under Section 313 CrPC had already been recorded. The petitioner has thus disclosed his defence and that the permission so granted by the trial Court amounts to allowing the respondent No.2-complainant to make improvement upon his case and fill in the lacunae. It is further submitted that the witnesses sought to be examined by respondent No.2-complainant were already named in the list of witnesses furnished by respondent No.2-complainant and that the decision to not examine any more witness was a conscious decision. There is no emergence of any new fact that would necessitate allowing the application and even the application does not disclose any reason detailing why the respondent No.2-complainant chose not to examine the said witnesses at an earlier stage and also as to why the statement of the said witnesses is essential for securing the ends of justice in the criminal complaint. It is submitted that as per the complaint instituted by respondent No.2, Vikas, Bittu and Tilak are brothers of the complainant, who are claimed to be attracted to the place of incident upon hearing noise/alarm. The other witness referred by the petitioner in the application namely Naresh son of Tara Chand is claimed to have brought father of the complainant to the Civil Hospital for treatment.

5. It is argued that the evidence of the witnesses is at best a circumstantial evidence to be led as a corroborative piece of evidence. Their examination is not likely to advance any object and shall only delay the

proceedings before the trial Court.

6. *Per contra*, the prayer made by the counsel for the petitioner is opposed by the learned counsel appearing for the State of Haryana. He submits that a detailed order has been passed by the trial Court and it has been noticed that the interest of the petitioner is in no way prejudiced by allowing the said application and permitting the said witnesses to be examined. It is also observed that since the said witnesses were already named in the complaint, hence, it would not amount to introduction of a new case against the petitioner or filling in a lacunae in the case of the prosecution. He further argues that interest of justice needs to be balanced and in the absence of material prejudice being caused to the petitioner, the application in question should be allowed.

7. Sh. Ajay Ghanghas, Advocate appears on behalf of respondent No.2-complainant has supplemented the argument advanced by learned State counsel and submitted that the petitioner shall get due opportunity to cross-examine the said witnesses and he cannot claim any prejudice. It is further contended that the right to speedy justice cannot supersede ends of justice and that in the process of expeditious disposal of a complaint, justice should not be sacrificed.

8. I have heard learned counsel appearing on behalf of the parties and have gone through the record with their able assistance.

9. The Judicial Magistrate First Class, while considering the application submitted by respondent No.2-complainant under Section 246(6) and 311 CrPC has observed as under:-

10. Now by way of the present application, the complainant wants to examine four witnesses namely Vikas, Bittu, Tilak and Naresh. It is pertinent to mention that all these persons find specific reference and have been clearly mentioned in para no.3 and para no.5 of the complaint filed by the complainant alleging that they were present at the spot on the day of the

alleged occurrence. It is stated in the complaint that Vicky @ Vikas, Bittu and Tilak arrived at the spot, after hearing the noise of the complainant and after intervening, they saved the complainant from the accused persons. Further, Naresh took the injured complainant to Civil Hospital, Bahadurgarh for medical treatment. As such, in my opinion, the above witnesses are material whose evidence is essential for just decision of the present case. Furthermore, it is also significant of note that names of all these witnesses are also mentioned in the original list of witnesses which was filed by the complainant along with his complaint.

11. Moreover, no prejudice would be caused to the accused as they would get sufficient opportunities to cross-examine the above mentioned witnesses.

10. Section 246(6) CrPC falls under Chapter XIX of the Code of Criminal Procedure, 1973 dealing with the trial of a warrant case by a Magistrate. Section 246 CrPC deals with the procedure to be followed by a Magistrate when an accused is not discharged. Sub-Section 6 of Section 246 CrPC deals with recording of the evidence of the remaining witnesses. The relevant statutory provision is thus reproduced as under:-

246. Procedure where accused is not discharged.

- (1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.*
- (2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.*
- (3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.*

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub- section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross- examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross- examination and re- examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross- examination and re- examination (if any), they shall also be discharged.

The Section thus provides for a two-step process after a charge has been framed against an accused. The provision under Section 245(5) CrPC entitles an accused to exercise an option where he wishes to cross-examine any of the witnesses for the prosecution whose evidence has already been taken and that in the event of an exercise of such discretion by the accused, such witness shall be recalled and can be subjected to further cross-examination or re-examination, as the case may be. It further contemplates that thereafter, the remainder of the witnesses are required to be examined.

11. On a plain reading the order of the trial Court seems allowing the remainder of the witnesses, cited by the prosecution in its application, to be examined in consonance with the procedure prescribed, however, it is essential to notice that respondent No.2-complainant made a statement that he does not wish to examine any other witnesses. The said statement was duly recorded and relying thereupon, the counsel for the petitioner also stated that he does not wish to further cross-examine any of the said witnesses. It was on the basis of the said statement that evidence of the prosecution was closed and statement under Section 313

CrPC was recorded. Although the said aspect is not expressly stated in the petition or in the impugned order, however, the said fact is specifically stated in the reply filed by the petitioner before the Judicial Magistrate First Class, Bahadurgarh to the application under Section 246(6) and 311 CrPC and was also raised at the time of argument.

12. The said stage was not disputed by the counsel for the respondents and thus it is presumed that statement under Section 313 CrPC has already been recorded. While Section 246 CrPC is a part of Chapter XIX of the Code of Criminal Procedure dealing with trial in a warrant case and deals with evidence of prosecution. Section 247 CrPC, thereafter deals with evidence in defence. Section 313 CrPC is a part of General Provisions as to the trials under Chapter XXIV CrPC. The said provision is reproduced hereinafter below:-

313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for

or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

The said Section stipulates that after the evidence of prosecution is examined/concluded, he shall be questioned regarding the evidence brought against him before his is called on for his defence. In the scheme of things, Section 311 CrPC comes prior to Section 313 CrPC but has been given a wide import considering that the same is to be invoked on satisfaction of judicial conscience and to secure the ends of justice.

13. Hence, the driving force for exercise of the said jurisdiction is as to whether the examination of such witness is essential to the just decision of the case or not. Therefore, to appreciate the significance of the witnesses, a reference is required to be made to the paragraphs where the names of the said witnesses figure setting out the necessity, if any, of such witnesses to be examined. The relevant extract of Paragraph 3 and 5 of the complaint are extracted as under:-

*“3. xxxxxxxxxx. The appellant for saving himself raised the voice 'Bachao Bachao and hearing the noise the brother of the appellant Vicky and Bittu and Tilak sons of Jwala Prashad who were passing from there by mediating released the appellant from the above mentioned accused. From which his life could be saved.
(...)”*

5. That the father Jiwan Lal of the appellant, Naresh son of Tara Chan, Bittu, Tilak and Sahib Singh etc. brought for treated in the Civil Hospital Bahadurgarh. Where his medical examination and MLR No.G.H./B.G./49/08 dated 11.09.2008 was prepared and the treatment was done by the cut, caused due to hitting of Axe at the right side of the appellant, by stitching. Copy of M.L.R. Is attached with the application.”

14. It is apparent from a perusal of the same that insofar as the witnesses Vikas, Bittu and Tilak are concerned, the said witnesses were attracted to the place upon hearing the noise/alarm raised by the petitioner. Invariably, the said witnesses have come to the spot after the incident in question had already taken place. The injured/complainant himself has appeared in the witness-box and that the evidence of the witnesses sought to be examined does not in any manner strengthen the case of the prosecution. It cannot be said that the case of a prosecution would fail for want of evidence of the witnesses, who were attracted to the spot after the incident in question had already taken place and the injuries had been sustained. The said witnesses are not witnesses to the occurrence. In any case once the injured/complainant has already entered into the witness-box, the evidence of the said witnesses cannot in any manner make any qualitative difference to the prosecution evidence. The deposition of the said witnesses does not prove any fact or event any better than the evidence already led.

15. Furthermore, insofar as the evidence of Naresh is concerned, he is stated to have accompanied Jiwan Lal and others to bring the respondent No.2-complainant to the hospital. Jiwan Lal, father of the complainant-respondent as well as the attending doctor have already been examined by the complainant. Hence, even the testimony of the said witnesses does not tend to establish any new fact. It cannot be said that the failure to examine the said witnesses shall occasion travesty of justice or would defeat the ends of justice.

16. It was essential for the trial Court to have looked into the necessity of evidence sought to be examined and as to whether the testimony of such witnesses is crucial and essential for determination of the controversy. Once the trial Court comes to a finding that the examination of the said evidence is essential to secure the ends of justice, it is in the said circumstance that jurisdiction under Section

311 CrPC is to be exercised. The language of Section 311 CrPC clearly shows that absence of any prejudice to either of the parties is not a ground for which such a jurisdiction is to be exercised. The essential pre-requisite is only that such evidence is necessary to secure ends of justice. The discretionary power conferred by Section 311 CrPC has to be exercised judiciously. Needless to mention that greater the power, greater is the necessity for circumspection and caution.

17. The Hon'ble Supreme Court further laid down various principles borne in mind by a trial Court while dealing with Section 311 CrPC in the judgement of **Rajaram Prasad Yadav Vs. State of Bihar**, in Criminal Appeal No.830 of 2013 decided on 04.07.2013. The relevant extract of the judgment is reproduced hereinbelow:-

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

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

g) 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.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C. 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.

18. The Hon'ble Supreme Court held in the matter of **V.N. Patil Vs. K. Niranjana Kumar** bearing Criminal Appeal No.267 of 2021 decided on 04.03.2021 that the essentiality of the evidence to the just decision of the case is a determinant factor for exercise of jurisdiction under Section 311 CrPC. The relevant extract of the said judgement reads thus:-

14. The scope of Section 311 CrPC which is relevant for the present purpose is reproduced hereunder:-

“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.”

15. The object underlying Section 311 CrPC 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 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 the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion.”

16. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar Vs. State of Uttar Pradesh and Another 2011(8) SCC 136.

“17. 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.”

17. This principle has been further reiterated in Mannan Shaikh and Others Vs. State of West Bengal and Another 2014(13) SCC 59 and thereafter in Ratanlal Vs. Prahlad Jat and Others 2017(9) SCC 340 and Swapan Kumar Chatterjee Vs. Central Bureau of Investigation 2019(14) SCC 328. The relevant paras of Swapan Kumar Chatterjee(supra) are as under:-

“10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application

has been filed as an abuse of the process of law.”

19. The entire circumstances and evidence brought against an accused is explained to an accused after all witnesses of the prosecution have already been examined but before an accused is called upon to lead his defence. The answers given by an accused can be taken into consideration in such a trial and put in evidence for or against him in any other enquiry or a trial for the offences that such answers may tend to show that he has committed. The same is intended to help the prosecutor and the counsel for the complainant to prepare the relevant questions that are required to be put to an accused.

It is undisputed that the witnesses now being sought to be examined could have actually been summoned by the prosecution before the trial Court under Section 246(5) CrPC, however, invoking the said provisions after the statement under Section 313 CrPC has already been recorded would amount to rolling the dice back.

20. Keeping in view the principles laid down by the Hon'ble Supreme Court in the matter of Rajaram's case (*supra*) as well as in the matter of V.N. Patil's case (*supra*) and being conscious of the fact that the counsel appearing on behalf of the respondent No.2-complainant had made a specific statement not to lead any evidence, coupled with the fact that statement under Section 313 CrPC has also been recorded, it is evident that entire case of the prosecution has already been put to the petitioner and that he has already disclosed his defence. Besides, the prosecution case is not dependent upon the evidence of the said witnesses as other witnesses to the said incident have already been examined. A mere additional quantity of the witnesses shall not make any improvement. There is no reason or explanation given by respondent No.2-complainant as to why the testimony of the said witnesses is essential and as to how the evidence of the injured/complainant/victim who has already stepped into witness-box is not

sufficient to prove the case and that the witnesses, who are claimed to have arrived at the scene of the crime after the incident in question had already taken place are integral and essential to establish the occurrence of the offence or event. Besides, once the doctor as well as one of the persons who had accompanied the victim/injured to the hospital have already been examined, how and under what circumstances is it necessary for just decision of the case that even the other witnesses accompanying the injured to the hospital are essential to be examined to prove the factum of respondent No.2-complainant for being brought to the hospital for treatment.

21. The evidence of the witnesses sought to be examined under Section 311 CrPC have not been shown to be essential to the just decision of the case and that it is also not apparent that absence of the testimony of the witnesses would in any manner occasion failure of determination of the truth. Rather, an attempt at seeking examination of such witnesses seems to be an attempt towards filling in the lacunae in the prosecution case. The respondent No.2-complainant has failed to establish any grave prejudice or failure of justice that would be caused due to non-examination of the witnesses.

22. In this view of the matter, the judgement dated 14.07.2017 passed by the Judicial Magistrate First Class, Bahadurgarh District Jhajjar is set aside. The present petition is allowed.

(VINOD S. BHARDWAJ)
JUDGE

30/05/ 2022

S.Sharma(syr)

<i>Whether speaking/reasoned</i>	:	<i>Yes/No</i>
<i>Whether reportable</i>	:	<i>Yes/No</i>