

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

CRR-562-2016

Date of Decision: 14.11.2022

Kuldeep Singh and another

..... Petitioners

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present: Mr. Ashok Singla, Advocate
for the petitioners.

Mr. Vinay K.Gupta, AAG, Punjab.

HARSH BUNGER J.

The present criminal revision petition has been filed by the Petitioners for seeking quashing of the impugned order dated 01.02.2016 passed by the learned Judge, Special Court, Patiala, whereby an application under Section 311 Cr.P.C. (Annexure P-4), filed by the Additional Public Prosecutor for the State for summoning PW-1 HC Mohinder Singh for his cross-examination, has been allowed.

Learned counsel for the petitioners has submitted that the learned trial Court has erred in law in allowing the application under Section 311 Cr.P.C., vide impugned order dated 01.02.2016, as the prosecution evidence already stood closed by that time. It is further

submitted that the provisions of Section 311 Cr.P.C. should not be allowed to be used by the prosecution to fill lacunae in the case. It is also submitted that earlier when application under Section 311 Cr.P.C. was filed by the prosecution for summoning Constable Manpreet Singh, which was allowed vide order dated 04.01.2016, at that time no prayer was made to summon HC Mohinder Singh, and once the evidence was closed on 11.01.2016, the second application could not have been entertained by the learned trial Court. It is further submitted that no opportunity of hearing has been afforded to the petitioners while passing the impugned order dated 01.02.2016.

Notice of motion was issued in the present case on 11.02.2016 and the records of trial Court were requisitioned.

Learned State counsel has supported the impugned order dated 01.02.2016 by submitting that the purpose and intent of Section 311 Criminal Procedure Code is to provide the Court with the authority to exercise its discretion, so that just decision could be reached by the Court in a case. It is submitted that the learned Trial Court having been satisfied with the given facts and circumstances in the application, had ordered summoning of PW1 – HC Mohinder Singh as his cross-examination had not been conducted because the same was deferred on the request of learned defence counsel and inadvertently the prosecution evidence was closed. It is submitted that the said discretion of the learned lower Court should not be interfered by this Court. It is further submitted that there is no illegality, infirmity or perversity in the said order, whereby the learned Trial Court has allowed the application under Section 311 Cr.P.C., and accordingly prayer for dismissal of the present revision petition has been made.

I have heard learned counsel for the parties and have gone through the paper book as well as records with their able assistance.

Before considering the submissions of learned counsel for the parties, it would be apposite to extract Section 311 Cr.P.C., which is reproduced as below:-

“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.”

It is apparent from the above quoted provision that the Court is vested with a broad and wholesome power to summon and examine or recall and re-examine any material witness at any stage, if his/her evidence appears to be essential to the Court for the just decision of the case.

The nature and extent of the power vested in the Courts under Section 311 Criminal Procedure Code to recall witnesses was examined by the Hon'ble Apex Court in ***Hanuman Ram v. The State of Rajasthan &Ors., 2008(4) RCR (Criminal) 823***, wherein it was held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. The Hon'ble Apex Court had observed as under:

"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.

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, enquires 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 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."

The submission on behalf of the petitioner that the learned trial Court has erred in law in allowing the application under Section 311 Cr.P.C., as the prosecution evidence already stood closed by that time; does not hold any water in view of the recent judgment rendered by the Hon'ble Apex Court in Criminal Appeal No.1021 of 2022 titled as "**Varsha Garg Vs. State of Madhya Pradesh and others**"(decided on dated 08.08.2022), wherein the following observation has been made in paragraphs No.31 and 32 thereof:-

*"31. Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P. (1978) 2 SCC 518, State of W.B. v. Tulsidas Mundhra (1963) Supp 1 SCR 1, Jamatraj Kewalji Govani v. State of Maharashtra (1967) 3 SCR 415, Masalti v. State of U.P. (1964) 8 SCR 133, Rajeswar Prosad Misra v. State of W.B. (1966) 1 SCR 178 and R.B. Mithani v. State of Maharashtra (1971) 1 SCC 523**, the Court held:*

"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the fact and circumstances of each case."

32. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.”

From the above discussion, it is manifest that the power under section 311 of Cr.P.C. can be exercised at any stage of the proceedings for the just decision of the case and even if the evidence of both sides is closed.

The other contention on behalf of Petitioner is that in the garb of exercise of powers under Section 311 of the Code, a court cannot allow the prosecution to fill up lacuna in the case; however, in my considered view, there is no merit in this submission of the counsel for the Petitioner. The case in hand is one under the Narcotic Drugs and Psychotropic Substances Act, 1985. A perusal of the file would show that PW-1 HC Mohinder Singh is one of the main and crucial witnesses in this case, as he is a recovery witness in the case.

It is apparent from record that PW-1, i.e. HC Mohinder Singh, was examined as prosecution witness on 23.02.2015 and his cross-examination was deferred on the request of learned counsel for the accused. Accordingly, application under Section 311 Cr.P.C. was filed for the cross-examination of the said PW-1, to complete his evidence.

The concept of cross-examination is a part of the fair trial. Its

denial will gravely affect the rights of the prosecution as well as the accused. It is well settled that if a witness has not been cross-examined then his evidence cannot be used in evidence against the opponent.

Apart from it, a Judge while holding a criminal trial cannot be taken as a mere spectator. It is the duty of the Judge to verify as to whether necessary witness has been examined and also as to whether witnesses whose statements have been recorded, completely or partially, have been put to cross-examination. He is the sole judge of the situation.

It is not disputed that in the instant case, the witness PW-1 HC Mohinder Singh had appeared and his examination-in-chief has already been recorded, but his cross-examination was deferred on the request of the learned counsel of accused. It appears that the cross-examination of PW-1 HC Mohinder Singh could not be conducted inadvertently. In this situation, it becomes the duty of the presiding officer to suo-motu call such a witness. In this view of the matter, in the interest of justice, it was necessary to recall the witness for purpose of his cross-examination either by suo-motu or on the application of the prosecution / complainant by applying the provisions of section 311 of Cr.P.C., 1973.

In ***Rajendra Prasad v. Narcotic Cell, Delhi, 1999(3) R.C.R. (Criminal) 440***, the Hon'ble Apex Court held as under:

“7. 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 error in human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up."

Since the object is to do complete justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.

Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

In the instant case, learned trial Court, while allowing application under Section 311 Cr.P.C. has observed as under:-

“ - x - x - x -

4. I have heard Ld. Addl. P.P. for the State as well as Ld. Counsel for the accused persons and have gone through the judicial file very carefully.

5. It is obligatory at the part of the court to summon the witness in case his evidence appears to be essential for the just decision of the case. Such power may be exercised at any time. However, the power is

circumscribed by the principle underlying the Section, that is, the evidence to be obtained must be essential of the just decision of the case.

6. The perusal of the file reveals that PW1 HC Mohinder Singh was examined-in-chief on 23.03.2015. His cross-examination on that day was deferred on the request of Ld. Counsel for the accused. The prosecution examined seven witnesses in all and the Ld. Addl. P.P. for the State closed the prosecution evidence on 11.01.2016 by making a statement. However, PW1 could not be cross-examined thereafter and due to inadvertence the Ld. Addl. P.P. for the State closed the evidence of the prosecution. PW1 HC Mohinder Singh is a recovery witness of this case and as such, his cross-examination is essential for the just decision of this case which has been deferred on the request of the Ld. Counsel for the accused.

7. There is no merit in the submission raised by the Ld. defence counsel that the cross-examination of this witness at this stage shall prejudice the case of the accused. It is, rather an opportunity being given to the accused persons for the cross-examination of PW1 HC Mohinder Singh which was earlier deferred on the request of their counsel.

8. As per the settled proposition of law when due to absence of defence lawyer, the accused could not cross-examine the witness, such a witness can be recalled for cross-examination at any stage as his evidence is essential for the just decision of the case. As such, in the facts and circumstances, the application filed by the Ld. Addl. P.P. for the State under Section 311 of the Cr.P.C. is allowed.”

No illegality or perversity has been pointed out in the order

dated 01.02.2016 passed by the learned Judge, Special Court, Patiala,

considering the fact that PW1 HC Mohinder Singh was examined-in-chief on 23.03.2015 and his cross-examination was deferred on the request of counsel for the accused; coupled with the fact that since PW1 HC Mohinder Singh is a recovery witness of this case, accordingly his cross-examination is essential for the just decision of this case. Thus, the learned Trial Court was justified in allowing the application under Section 311 Cr.P.C.

No other point has been urged.

In view of the aforementioned facts and circumstances and also the settled principles of law, the instant petition is bereft of any merit and the same is accordingly dismissed. Impugned order dated 01.02.2016 passed by the learned Judge, Special Court, Patiala, allowing the application under Section 311 Cr.P.C., for summoning PW-1 HC Mohinder Singh for his cross-examination; is upheld.

14.11.2022*Apurva***(HARSH BUNGER)
JUDGE**

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No