

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

201

**CRR-3784-2017(O&M)  
Date of decision: 30.05.2022**

**BALWINDER SINGH @ BINDER SINGH**

....Petitioner(s)

**Versus**

**STATE OF PUNJAB**

...Respondent(s)

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

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Present : Mr. Sarwinder Goyal and Mr. Sardavinder Goyal, Advcoates  
for the petitioner.

Ms. Amarjit Kaur Khurana, DAG Punjab.

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**VINOD S. BHARDWAJ. J. (ORAL)**

The instant revision petition has been filed under Section 401 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for setting aside the impugned order dated 08.09.2017 passed by Additional Sessions Judge, Barnala, whereby the application under Section 311 CrPC for summoning of witness before the trial Court in FIR No.17 dated 18.03.2015 under Section 377 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 5 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') registered at Police Station Rureke Kalan District Barnala has been illegally and arbitrarily allowed.

2. Learned counsel for the petitioner contends that the order passed is illegal inasmuch as the child was not named as a witness in the report furnished under Section 173 CrPC. No testimony of the child witness had been recorded by the Police during the course of investigation either under Section 161 CrPC or Section 164 CrPC and as such, there is every possibility of the child having been

tutored. He contends that the attempt of the prosecution to produce the child as a witness after almost 02 years and 6 months from the date of the alleged incident in the year 2015 was clearly an attempt to fill in the lacunae in the case of the prosecution. He further submits that the medical report of the victim does not support the version of the prosecution. It is pointed out that the medical examination of the victim was conducted on 20.03.2015 as per the said medical examination, there was no external marks of the injury and that the perianal skin was normal, there was no scar, no redness and tenderness on palpation present. It is contended that on reading of the said MLR, it clearly rules out the commission of offence punishable under Section 377 IPC and Section 5 of the POCSO Act. He further submits that the statement of the father and mother have already been recorded by the trial Court which does not make out any offence against the petitioner from perusal of the said statement.

3. A further reference is made to Section 35 of the POCSO Act, 2012 to contend that the said provision contains that the evidence of the child has to be recorded within a period of 30 days of the Special Court taking cognizance of the offence and reasons for the delay, if any, shall be recorded by the Special Court. A further reference is made to the provision of Section 164 (5A) CrPC to contend that it is mandatory for the police to get the statement of the victim recorded under Section 164 CrPC where the offence is related to Section 354 and 376 of the IPC and in the nature of rape. He contends that the said provision has not been incorporated consciously by the legislature while carrying out the amendment in the year 2013 since a similar provision stands incorporated in the POCSO Act itself.

4. Learned counsel for the petitioner also made a reference to the

judgment of the Delhi High Court in the matter of **Hari Prasad Meena V/s State, reported as 2010 (7) RCR (Criminal) 1594** to contend that the child witness having not been produced before the Court for recording the statement under Section 164 CrPC when the incident was fresh in her mind cannot be permitted to be produced in evidence at a later stage.

5. *Per contra*, learned State counsel contends that there is illegality in the order passed by the trial Court and that examination of the child witness, who was victim in the incident, is essential for just adjudication of the case. She further contends that there is no prohibition contained in the statute for examination of the child (essential victim) at any stage before final determination of a trial. In the absence of any prohibition, there can be no impediment on allowing the examination of the witness whose testimony is crucial for final adjudication of the controversy.

6. I have considered the arguments advanced by the respective parties and have gone through the material on record as well as judgment relied upon by the counsel for the petitioner.

7. Before proceeding further in the matter, it must be noticed that the incident in question is stated to have taken place in the year 2015, when the victim-child was subjected to sexual assault by the accused person. After the culmination of the investigation, a final report was filed. Father and mother of the victim were nominated as prosecution witnesses PW-1 and PW-2 respectively. It is significant to notice that the child who was victim of the crime was not nominated as a witness. Accordingly, an application under Section 311 CrPC was submitted by the Additional Public Prosecutor on 23.08.2017 for summoning the victim as a prosecution witness. A response to the said application was filed by the petitioner

herein to raise an objection that it was an attempt to fill in a lacunae in the case of the prosecution. Upon consideration of the rival submissions advanced by the respective parties, the trial Court allowed the said application after noticing that the victim was a material witness to the case of the prosecution and that the testimony of the witness is not an attempt to fill in a lacuna, rather the victim having suffered the assault is a crucial witness and the entire case depends on the testimony of the victim himself.

8. The same would thus necessitate the scope of the statutory provision referred to by the counsel for the petitioners. While referring to the provision of Section 164 (5A) CrPC, it has not been in dispute that the said provision does not apply to the offences attracted under Section 377 IPC and to the offences relatable to the POCSO Act. The interpretation of the petitioner that the mandate must apply as offence is similar to the offences noticed under Section 164 (5A) CrPC does not hold much ground. By an interpretation, the Court cannot introduce what has not been incorporated by the Statute. The amendment in the provisions carried out in the year 2013 and the omission in question was held to be conscious. The POCSO Act having been notified in the year 2012, it cannot be said that the legislature was not aware with respect to the offences in the nature of Section 377 IPC or attracting the provisions of POCSO Act. The omission/deletion is conscious on the part of the legislature. Resultantly, the mandate of Section of 164 (5A) CrPC is not *ipso facto* applicable to the facts of the present case. The submission advanced by the learned counsel is accordingly rejected.

9. Secondly, while referring to the argument referred to by the learned counsel arising on an interpretation of Section 35 (1) of the POCSO Act, the said provision mandates the Court to record the testimony of a child witness within a

period of 30 days. Even though the said provision is gauged in mandatory words and uses the term “*shall*”, however, the said provision does not prohibit or refrain the testimony of the child witness to be recorded thereafter. Rather, the subsequent part of the said Section itself contemplates that in the event the testimony of the witness is not recorded within a period of 30 days, the Court is required to record reasons for the same. Hence, there is no absolute bar or embargo. It is well settled position in law that even though a statutory provision may be using mandatory terms, however, the said terms may still be directory. It is apparent from a perusal of the statutory scheme that no consequences for the failure to record the statement within the prescribed period have been indicated in the statutory scheme. Resultantly, in the absence of any prohibition or a liability arising as a result of such failure, it cannot be said that the condition incorporated is mandatory and that in the event of violation of the said condition, the testimony of the child witness cannot be recorded at all by the concerned Court.

10. Referring to the submission made by the learned counsel that no valid reasons have been given for delay in recording the statement of the child witness, it is apparent that the Court was not apprised with respect to the child witness as he was not nominated as a witness by the prosecution itself. The same, in my view appears to be a sufficient ground for the delay in recording the testimony of the child witness.

11. Now adverting to Section 311 CrPC, the same is reproduced hereinbelow:-

*“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.”*

12. A perusal of Section 311 clearly shows that the said Section has been widely worded so as to empower the Court to permit adducing any evidence, re-examine or summon any witness for cross examination at any stage of the case in order to secure the ends of justice. The legislature has consciously used certain words which require special mention. The use of words “*any Court*”; “*at any stage*”; “*summon any person*”; “*or examine any person*”; “*though not summoned as a witness*”; “*re-examine any such person*”; “*if his evidence appears to it to be essential to the just decision of the case*”. Hence, the language of the statute clearly shows that the widest possible terms have been expressed by the statutes so as to not limit the discretion of the Court in any manner or fetter its jurisdiction to discharge justice. It is, however, only an established rule of prudence that while invoking the extraordinary discretionary powers, the Court must exercise circumspection and satisfy itself with respect to existence of exigent circumstances as are necessary to be taken care of while ensuring that ends of justice are duly met.

13. It is a cardinal rule of law in evidence that the best available evidence ought to be brought before the Court to prove a fact or point in issue. Apparently, the failure on the part of the Investigating Agency to nominate the victim as one amongst the witnesses may be an act of gross oversight or negligence, however, at the same time, it may also be an act of mischief or malice on the part of the Investigating Agency. Resultantly, the equities in favour of the parties have to be balanced without compromising and ensuring that the ends of justice are secure. It

was with the said intent and to enable the Court to find out the truth and to render a just decision that the salutary provision under Section 311 CrPC has been incorporated with in the statutory scheme.

14. It would thus be essential for the Court to embark on the necessity of leading such evidence and its necessity for establishing the truth as to whether sufficient circumstances exist that would have occasioned the failure on the part of the prosecution to examine such witness.

15. It is a common experience in Criminal Courts that defence counsel would always raise an objection, whenever the Court feels it necessary to exercise its powers under Section 311 CrPC by raising an objection that the Court could not fill in lacunae in a prosecution case. A “*lacunae*” in the prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor or the Investigating Agency either during trial or in producing relevant material or the witnesses. It has to be recognized that *to err is human* and the investigating agency/prosecuting authority also comprises of humans and the possibility of making such mistakes cannot be wholly ignored. A corollary of any such lapses or mistake during conducting of the case cannot be understood as a lacuna which a Court cannot fill up. The lacunae in the prosecution must be understood as an inherent weakness in the matrix of the prosecution case. The advantage of such inherent weakness can be compounded in favour of an accused, however, a lapse, oversight or negligence on the part of the prosecution in the management of its case or investigation cannot be termed as a lacuna or an irreparable lapse. No party in a trial can be foreclosed from correcting errors. In case a proper evidence is not brought to the Court, it is incumbent upon the Court to be magnanimous in permitting such evidence to be brought and the mistakes to be rectified. After all,

the functionary of the criminal Court is administration of the Criminal justice and not to count errors committed by the parties or to find out and declare who amongst the parties performed better. The said aspects were duly noticed by the Hon'ble Supreme Court in the matter of **Mohanlal Shamji Soni Vs. Union of India reported as 1991 Supp (1) SCC 271.**

16. The Rajasthan High Court in the case of **Salman Khan Vs. State of Rajasthan reported as 2015 SCC Online Raj 531**, while interpreting the powers under Section 311 CrPC held that the said Section makes it mandatory for the Courts to summon a witness, in case the said witness was necessary for the just and proper decision to the facts of the said case and it cannot be refused on account of error on the party. The relevant extract thereon reads as under:-

*The Apex Court in the case of Hanuman Ram v. The State of Rajasthan, has, in fact, while interpreting the powers u/Sec. 311 of Cr.P.C, held that Sec. 311 Cr.P.C makes it mandatory for the Court to summon a witness, in case, the said witness was necessary for the just and proper decision to the facts of the present case and cannot be refused on account of error of the party. The Court further laid down the object underlying Sec. 311 of the Code, which reads:*

*“7. 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 for 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 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 CRM No. M 11970 of 2011 5 power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wide the power the greater is the necessity for application of judicial mind.”*

**20.** *Similarly, while dealing with such error and oversight, the Apex Court in the case of Rajendra Prasad v. Narcotic Cell through its Officer Incharge, Delhi, reported in 1999 Cr.L.J. 3529 : RLW 1999 (2) SC 321, held:—*

*“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 proved. 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 trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can before closed 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.”*

*The Apex Court further went on to say:*

*“We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments, The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision.”*

**21.** *Moreover, the provision of Section 311 of the Cr.P.C. permits the calling of a witness and producing document at any stage as long as the same is before the pronouncement subject to the condition that the said document should be relevant and essential for the just decision of the case. Wide power has been conferred to meet the ends of justice. If the Court comes to the conclusion that the same is essential, the Statute makes it mandatory on the Court to summon such a witness. The Apex Court in the case Mohanlal Shamji Soni v. Union of India, reported in 1991 Supp (1) SCC 271 : AIR 1991 SC 1346, while dealing with the jurisdiction of the Court under section 311 of*

*the Code has laid down 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. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of the Court not only to do justice but also to ensure that justice is being done. In order to enable a 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 inquiry, 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 or 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. The very usage of the words such as ‘any Court’ ‘at any stage’, or ‘any enquiry, trial or other proceedings’, ‘any person’ and ‘any such person’ clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with*

*circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps in the fresh evidence to be obtained is essential to the just decision of the case.”*

**22.** *Still further, the Apex Court in the case of Raja Ram Prasad Yadav v. State of Bihar, reported in 2013 (2) Apex Court Judgments 604 (S.C.) has laid down the following principles to be borne in mind by the courts while exercising powers under Section 311 of the Cr.P.C.:—*

*“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 reexamine any such person.*
- d) The exercise of power u/Sec. 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 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 u/S. 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 circum-spection. 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.”*

*23. Thus, in view of the above discussion, the only limit to the wide powers appears to be the underlying golden rule that witness and the document sought to be produced should be necessary for the just decision of the case with the object of finding out the truth or obtaining proper proof for such fact. The objection that the application has been moved only to fill a lacuna is normally raised in each and every case. In case, an application under Section 311 of the Cr.P.C. is dismissed on this ground alone, the very purpose of Section 311 of the Cr.P.C. would be defeated and the same would become redundant. The same depends upon facts of each case. Moreover, the right of the petitioner can always be safeguarded by granting equal opportunity to cross-examine,*

*lead evidence, etc. in accordance with law.*

17. A perusal of the aforesaid settled position in law clearly shows that the exercise of the power is steered by fundamental responsibility to administer complete justice to the parties. Whenever such a witness or his testimony is essential and critical for finding out the truth or for obtaining proper proof or the fact and which will lead to just and correct decision of the case, testimony of such a witness is ought to be allowed by the Court. While deciding on such an application, it is not to be seen as to whether it is possible to pronounce a judgment without such evidence, but, what has to be seen is as to it whether would occasion failure of justice without such evidence being considered.

18. Having considered the same it now leads this Court to examine as to whether testimony of the witness is essential and crucial for just and proper adjudication of the present matter.

19. It is not in dispute that the prosecution in question has been instituted on the sexual assault committed against the victim, who was at that point of time only 5-6 years of age. The testimony of the parents of the victim is only a circumstantial evidence towards establishing the commission of the offence. The victim himself is a crucial and most important link for establishing the offence under Section 377 IPC and Section 5 of the POCSO Act. The failure on the part of the prosecution to lead the testimony of the witness, if otherwise, pertinent to depose, would rather be defeating the interest of justice and would amount to giving an undue advantage and walk over to an accused. The same cannot be object of law or the object of administration of criminal justice.

20. Insofar as the reliance of the petitioner on the matter of Hari Prasad (*supra*) is concerned, the same is not applicable to the facts of the instant case. In the said matter, the child was earlier summoned as a witness before the Court after

about 8 months of the alleged incident, however, at that point in time the child was not capable of answering or responding to the queries posed and failed in making a testimony. It was thereafter that an application under Section 311 CrPC was moved to summon the said witness again. Expressing concerns with respect to the child having been tutored during the intervening period, the Court set aside the order whereby the jurisdiction under Section 311 CrPC had been exercised. The facts of the present case are at complete variance. The case in hand does not relate to a situation where the witness had been summoned earlier and failed to depose before the Court. *Per contra*, the witness has not been summoned before the Court at any stage. Resultantly, reference to the said judgment is misplaced. No other point was urged or argued.

21. Taking into consideration the facts noticed above and the precedent judgments of the Hon'ble Supreme Court, the present petition is dismissed. The order passed by Additional Sessions Judge, Barnala dated 08.09.2017 is affirmed.

22. Before parting with the judgment, it is essential to notice that vide order dated 12.10.2017, the operation of the order had been stayed. Much period has already elapsed since then and it is thus desired that the trial Court shall expeditiously record the testimony of the child.

The present petition is dismissed.

(VINOD S. BHARDWAJ)  
JUDGE

**May 30, 2022**

*S.Sharma(syr)*

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