

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

234

CRM-M-31015-2020 (O&M)

Reserved on: 02/04/2022

Pronounced on: 17/05/2022

NISHA

....Petitioner

Versus

STATE OF HARYANA AND ANOTHER

...Respondents

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

Argued by : Mr. Alok Jain, Advocate
for the petitioner.

Mr. Kanwar Sanjiv Kumar, AAG Haryana.

Mr. Akshay Jain, Advocate
for SBI/respondent No.2.

VINOD S. BHARDWAJ. J.

The present petition invokes the jurisdiction of the High Court under Section 482 Code of Criminal Procedure (hereinafter referred to as 'CrPC') for quashing of the order dated 16.03.2020 (Annexure P-1) passed by Chief Judicial Magistrate, Rohtak, whereby the application dated 28.11.2019 (Annexure P-2) submitted by the petitioner under Section 311 CrPC in case FIR No.325 dated 02.08.2014 registered under Sections 420, 406, 419, 467, 471 and 120-B Indian Penal Code, 1860 (hereinafter referred to as 'IPC') at Police Station City Rohtak has been dismissed.

2. Briefly the facts of the case are being enumerated as under:-

- i. A complaint dated 02.08.2014 (Ex. PW-2/A) was submitted by B.S. Sodi, Manager of the SBI, Anaj Mandi Branch, Rohtak with regard to a fraudulent transaction in a sum of Rs.30,000/- from the account of Azad Singh on 01.08.2014 that led to registration of the FIR against the

- petitioner along with others.
- ii. After conclusion of the investigation, a final report was filed against the petitioner as well as co-accused Mayank, Praveen and Rohit Kumar, whose names figured in the disclosure statement of petitioner.
 - iii. FSL report was received by the Police on 16.12.2014, pointing out that character of the specimen writing of the petitioner matched with the disputed writing. Eventually, on consideration of the evidence produced by the respective parties, the Judicial Magistrate First Class, Rohtak found that the petitioner and the co-accused were guilty. Apparently, after recording a finding of conviction against the petitioner-accused, the case as well as accused were sent before the Chief Judicial Magistrate, Rohtak for passing of a severe sentence under Section 325 CrPC. The accused were thereafter heard by the Additional Chief Judicial Magistrate, Rohtak and sentenced to simple imprisonment for 3 years for each of the offences. All the sentences were ordered to run concurrently.
 - iv. The said order of conviction as well as sentence was challenged by the petitioners by means of filing an appeal before the Court of Sessions. It was also pointed out that reference made to the Chief Judicial Magistrate under Section 325 CrPC was faulty, inasmuch as the Magistrate had already recorded judgment of conviction against the petitioner whereas a Magistrate is only required to form an opinion of the accused being guilty and thereafter submit his proceedings and forward the case to the Chief Judicial Magistrate for passing an appropriate order of sentence. It is, thereafter, the prerogative and domain of the Chief Judicial Magistrate to pass final judgment and sentence or such order as he thinks fit. In the said process, he may examine the parties afresh, recall and examine any witness who had

- already disposed and may also call for or take any further evidence under Section 325(3) CrPC.
- v. The appeal filed by the petitioners bearing Criminal Appeal Nos.110 of 2017; 109 of 2017 and Criminal Revision No.75 of 2017 were heard together. The Sessions Judge, Rohtak allowed the appeal preferred by the petitioner and set aside the judgment dated 09.03.2017 passed by the Judicial Magistrate First Class, Rohtak and order of sentence dated 24.03.2017 passed by Additional Chief Judicial Magistrate, Rohtak to be not sustainable and being bad in law and ordered that the judgment dated 09.03.2017 passed by the Judicial Magistrate First Class, Rohtak be treated as an opinion only and not as a judgment of conviction.
- vi. The case was accordingly remanded to the Chief Judicial Magistrate, Rohtak by the Sessions Judge, Rohtak vide his judgment dated 20.08.2019 with a direction to treat the said judgment dated 09.03.2017 as an opinion and that the Chief Judicial Magistrate shall hear the parties, recall any witnesses, who have already deposed and take such further evidence, which he considers proper and appropriate and as mentioned in Section 325 CrPC and thereafter decide the case as per law. The matter was thereafter put up before the Chief Judicial Magistrate, Rohtak.
- vii. During the course of the pendency of the proceedings before the Chief Judicial Magistrate, Rohtak, the application under Section 311 CrPC was submitted on behalf of the petitioner for recalling PW-2 BS Sodhi, PW-11 ASI Nafe Singh Investigating Officer and PW-6 Gaje Singh and PW-8 lady Constable Parmila for further cross examination and concerned officials of CDS Belapur for additional evidence. The said application was opposed by the respondent and upon consideration of the rival submissions, was

dismissed by the Chief Judicial Magistrate, Rohtak vide order dated 16.03.2020. Hence, the present petition.

3. Learned counsel appearing on behalf of the petitioner has assailed the order passed by the Chief Judicial Magistrate, Rohtak as having been passed in violation of the directions issued by the Sessions Judge, Rohtak and ignoring the power conferred upon the Court under Section 325(3) CrPC as well as the mandate of Section 311 CrPC. It is further submitted that it was incumbent upon the Chief Judicial Magistrate to have allowed the said application to secure the ends of justice and that by not doing so, the rights of the petitioner, to claim fair trial, have been severely prejudiced.

4. It has been argued that initially an application had been filed on 17.03.2015 by the prosecution under Section 311 CrPC for examining additional witness Satish Kumar Dahiya, Additional Food and Supply Officer, Rohtak, who was not depicted in the prosecution list of witnesses. The petitioner recorded her no objection while the other accused contested the same. However, the application moved by the prosecution was allowed and the prosecution was permitted to examine the said witness vide order dated 15.05.2015.

5. Thereafter, the prosecution moved a second application dated 17.07.2015 again under Section 311 CrPC and sought to lead evidence pertaining to another incident of bogus opening of account of Raman and transaction routed through the said account. The said application was also contested, however, the Chief Judicial Magistrate, Rohtak allowed the said application as well vide order dated 19.08.2015. The prosecution thereafter moved third application under Section 311 CrPC dated 01.10.2015 for locating IP (Internet Protocol)/MAC of the system and mobile used for generating OTPs and Internet Banking kits and for cyber cell enquiry through the police department by use whereof the accused were

alleged to have withdrawn a sum of Rs.7,69,230/- on different dates from the account of one Mukut Bihari (HUF) New Grain Market, Rohtak.

6. Seemingly, an application for obtaining signature of petitioner Nisha for comparison was also moved. Objection to the said application was filed and vide order dated 18.02.2016, the Chief Judicial Magistrate, Rohtak dismissed the said application observing that the same is in the nature of carrying out re-investigation and further investigation and that the same is impermissible under the scope of Section 311 CrPC.

7. The prosecution, however made a fourth attempt by moving another application under Section 311 CrPC on 10.05.2016 with a specific prayer to see the specimen writing of Nisha. The said application was dismissed vide order dated 15.06.2016 after noticing that the application was an attempt to prolong on the proceedings.

8. The matter was eventually fixed for defence evidence vide order dated 18.12.2016. The prosecution, however, thereafter moved fifth application on 16.01.2017 under Section 311 CrPC for summoning Nafe Singh/Investigating Officer, who had already been examined as PW-11 on 09.10.2015 to produce the case property as mentioned in the recovery memo PW-2/C. The said application was allowed by the Chief Judicial Magistrate vide order dated 19.01.2017.

9. It is contended that it was after having availed numerous opportunities under Section 311 CrPC that the judgment of conviction was passed by the trial Court. The same was set aside by the Sessions Judge, Rohtak and the matter was remanded for fresh decision by Chief Judicial Magistrate. He submits that the application for recalling of the witnesses referred to above was thereafter moved by the petitioner, the same was however dismissed vide order dated 16.12.2019 (Annexure P-7). It was pointed out that the perusal of the order would show that it

was stamped as an order having been passed by Additional Civil Judge (Senior Division), Rohtak. A revision petition against the said order was preferred before the Sessions Judge, Rohtak. However, the said revision petition was dismissed vide order dated 20.01.2020, holding that the order passed on an application under Section 311 CrPC is an interlocutory order and that revision against the said order would not be maintainable as being barred under Section 397(2) CrPC. Consequently CRM-M- 6787 of 2020 was filed by the petitioner before the High Court. The said petition was allowed by the High Court after noticing that the exercise of civil power by the Chief Judicial Magistrate is not proper and that the order dated 16.12.2019 has been passed in a criminal case, direction was issued to the Chief Judicial Magistrate, Rohtak to decide the application of the petitioner filed under Section 311 CrPC afresh vide order dated 17.02.2020. Pursuant to the order dated 16.12.2019, having been set aside, the application was considered afresh by the Chief Judicial Magistrate and the order dated 16.03.2020 was passed dismissing the said application.

10. Learned counsel has argued that a plain reading of Section 325 CrPC gives plenitude authority to the Chief Judicial Magistrate to recall/re-examine any witness/evidence that has already been recorded to secure ends of justice and to come to a just decision in the case. Besides, when the earlier judgment of conviction was set aside by the Sessions Judge Rohtak, such a direction was specifically issued, however, disregarding the same, the application submitted by the petitioner has been dismissed. He further submitted that even though the application has been submitted under Section 311 CrPC, however, the nomenclature would not make any difference and once the power was vested with the Chief Judicial Magistrate under Section 325(3) CrPC, such power ought to have been exercised by the Chief Judicial Magistrate. Abdication of such authority

defeats the interest of justice. It is also argued that the prosecution had moved an application under Section 311 CrPC on as many as five different occasions, and as such the delay in culmination of the proceedings should not be cited as a reason to defeat the ends of justice. Even though Article 21 of the Constitution would mandate speedy adjudication of the dispute, however, the same should not be a reason to defeat right of an accused to claim fair trial. In a conflict between fair trial and speedy justice, a Court of law should be propelled by a fair trial as it is its first priority to afford sufficient opportunity to an accused to establish his/her defence and to ensure that ends of justice are duly met. Such a right cannot be defeated by raising an argument of delay in the proceedings. Even otherwise, the delay, if any, that had occurred in finalization of the proceedings, is attributable solely to the prosecution and the petitioner cannot be fastened with any liability and responsibility on account thereof. A reference was also made to the judgment of ***Manju Devi versus State of Rajasthan 2019 (6) SCC 328*** to contend that long pendency of the case cannot displace basic requirement of ensuring just decision after taking all necessary and material evidence on record. It is further submitted through aforesaid judgment that discretionary power that those under Section 311 CrPC is essentially intended to ensure that every necessary and appropriate measure is taken by Court to keep its record straight and to clear any ambiguity insofar as the evidence is concerned and also to ensure that no prejudice is caused to anyone. The age of a case by itself cannot be decisive of the matter when a prayer is made for examination of the material witnesses.

11. Reference was also placed on the judgment of ***V. N. Patil Vs K Niranjana Kumar, (2021) 3 SCC 661*** to contend that the discretionary power under Section 311 CrPC has to be exercised judicially. The said Section is only one amongst many provisions which strengthen the arms of the Court in its effort to

unearth the truth by following due procedures sanctioned by law. Such jurisdiction has to be exercised for valid reasons and to secure the ends of justice. It is submitted that re-examination of the witnesses referred to by the petitioner in the application under Section 311 CrPC was essential to the case inasmuch as the said witnesses had to be confronted with the process, that is required to be followed while posting officials, including the duties assigned to each and every Bank employee. There is an INB kit, which is issued specifying the role and responsibilities of each employee and that no INB kit had been issued on 27.06.2014. It is contended that the INB kit has to be given to every person who submits an application in writing after receiving the same duly stamped. An application submitted by Mukut Bihari on 27.06.2014 and 01.07.2014 were not found in file and on enquiry being conducted, it was recorded that no INB kit was issued. The INB kit was issued on 05.07.2014 and maker of the same is one Vikas Saroha and B.S. Sodhi. The witness Vikas Saroha had admitted in the enquiry that on 01.08.2014, the person who tried to withdraw the amount in a fraudulent manner were apprehended at the spot. Besides, PW-16/Rajveer, PW-15/Mukut Bihari, PW-14/Sandeep Kumar, and PW-13/Azad Singh are stated to have given hand-written application to the Bank Manager, however, the said record was not available on the case file and that the same were important documents. It was thus contended that the recall of the said witnesses is necessary to prove the innocence of the petitioner. Besides, no interest of justice would be defeated by allowing the application and permitting the petitioner to recall and re-examine the said witnesses and to cross-examine or confront them on the said aspects.

12. The petition has been opposed by the counsel appearing for the respondent, who has claimed that the power under Section 325 CrPC is not in the nature that would empower the Chief Judicial Magistrate to start a *de novo* trial. It

is a discretionary power of the Chief Judicial Magistrate and he may call for examination/re-examination, recall or call for further evidence in exercise of the powers under Section 325 CrPC for his satisfaction. The said power has to be exercised for formation of a judgment based upon the opinion of the Chief Judicial Magistrate before awarding sentence to the accused. The same is to be exercised to facilitate the Chief Judicial Magistrate and does not confer any right on an accused to recall any witness or seek re-examination of any witness. It is further submitted that the petitioner has stated in the application that the witnesses sought to be re-examined/recalled were not questioned on the said aspects when they appeared before the Court. The same cannot be a ground to recall the witnesses already examined. The power under Section 311 CrPC cannot be exercised to fill in a lacunae in the case of the defence once culpability of the petitioner already stands recorded by the Judicial Magistrate First Class and an opinion on the guilt has already been given.

13. It is submitted that the Branch Manager, when appeared as PW-2, was subjected to cross-examination at length and the culpability of the petitioner has been duly brought out in such deposition. It is also pointed out that being an employee of the Bank, the procedural requirement and details were fully known to the petitioner and the same are part of the public domain and the witnesses could have been questioned on the same. There is no reason for the petitioner to move the instant application at this belated stage. Besides, the said aspect being related to the institution of banking, there is no reason why the witnesses referred to above, ought to be recalled. Any person from the institution could have been summoned as defence witness when such opportunity was extended to the petitioner to prove their defence. Besides, the submissions as regards justification for calling PWs 13, 14, 15 and 16 in relation to the complaints allegedly given by

them to the Branch Manager are concerned, there is no occasion to question the said witnesses as even in the said application it has been stated that the hand-written complaint had been handed over to the Bank Manager but the same was not available on record. Thus, the said witnesses cannot be confronted or be required to produce or prove any complaint that is not in their possession and has not been brought on record of the bank. Thus, the justification for seeking the re-examination of the said witnesses is not made out. The record pertaining to the same could have been sought from the bank and the necessity or occasion to confront the said witnesses with the said application/complaint would have occasioned only when such a complaint had been exhibited on record. It is further argued that it is not a valid and sufficient reason as to why the said witnesses could not be questioned and in case such vague assertions and reasons are accepted, it would open up pandora's box and no litigation shall ever come to an end. Every, accused shall move such applications and submit that they could not put certain questions to the prosecution witnesses and thus the witnesses be recalled. Failure on the part of the accused to raise certain questions cannot be the basis for allowing an application under Section 311 CrPC.

14. I have heard learned counsel appearing for the parties and have gone through the documents available on file as well as judgment relied upon by the respective counsel.

15. Before proceeding further into the controversy, the relevant provision of Section 311 and 325 CrPC are extracted herein below:-

Section 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.

Section 325. *Procedure when Magistrate cannot pass sentence sufficiently severe.*

(1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub-section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

16. Perusal of the above shows that any Court may at any stage of enquiry trial or other proceedings summon any person as a witness or examine any person or recall and re-examine a person already examined if his evidence appears to the Court to be essential to the just decision of the case for exercise of jurisdiction under Section 311 CrPC. Section 325(3) CrPC is a provision to be invoked when when a Magistrate cannot pass a sentence sufficiently severe and is vested in the Chief Judicial Magistrate, to whom the proceedings are submitted to recall and

examine any witness who has already given evidence in the case and to pass such judgment, sentence or order in the case as he thinks fit and in accordance with law.

Thus, the Court is vested with sufficient powers to recall and examine any witness at any stage of a case so long the Court retains seisin of the proceedings and is of the opinion that such evidence is essential for the just decision of the case.

17. There is no dispute to the settled position of law that Section 311 CrPC confers a wide power, however, the said power is to be exercised only for strong and valid reasons and should be exercised with great caution and circumspection. Such a power is not to be exercised if the Court is of the view that an application has been filed as an abuse of the process of law. Besides, where the prosecution evidence had been closed long back and reasons for non-examination of the witnesses earlier are not satisfactory, the summoning of the witnesses at belated stage is likely to cause prejudice and should not be allowed. Apart therefrom, while dealing with such an application, the Court should not encourage filing of frivolous successive applications itself. The Hon'ble Supreme Court refers to the principles relating to the exercise of powers under Section 311 CrPC in the judgment of Manju Devi (*supra*). The relevant extract thereof is reproduced as under:-

“10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions 1. In Natasha Singh v. CBI (State) : (2013) 5 SCC 741, though the application for examination of witnesses was filed by the accused but, on the principles

relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:-

" 8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

(.....)

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of 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 opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as "any Court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

18. The said of principles were also summarized by the Hon'ble Supreme Court in the matter of V N Patil Vs. Niranjana Kumar (*supra*). The same reads thus:-

14. 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.”

15. 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.”

16. 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 reexamine 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.”

17. The aim of every Court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

19. A perusal of the said precedent judgments of the Hon'ble Supreme Court clearly establish that the power under Section 311 CrPC should be invoked to meet the ends of justice and has to be exercised for strong and valid reasons with great caution and circumspection. All the facts and circumstances of case shall have to be taken into consideration and in case it occurs that such an application is an abuse of process of law, such an exercise is not to be permitted.

Further, additional evidence must not be allowed only to fill up a lacunae in the

case of the prosecution or in the advantage or disadvantage of the accused or to cause serious prejudice to the evidence of the accused. It should not be allowed to give an unfair advantage to a party and must also not be received as a disguise to re-trial or to change the nature of the case.

20. The determinant factor thus is whether such evidence is essential to the just decision of the case and necessary to secure ends of justice. A balanced approach is thus required to be adopted and it is to be ascertained as to whether the evidence is being sought to be introduced to fill the lacunae in its case. At the same time, the stage of the case is also to be kept in mind along with nature and character of the evidence sought to be brought, its significance for determining the culpability of an accused and also as to whether valid circumstances and justifications exists as to why such evidence could not be brought earlier. It also needs to be kept in mind whether the evidence sought to be brought is essential to prove the case/defence or is an additional circumstance to strengthen a case/defence already set up and whether such evidence could have been known to the party or be proved by some other source. A mere semblance of prejudice sought to be projected is separate and distinct from actual and heal prejudice. Extra-ordinary powers come with extreme responsibility to exercise the same for valid reasons that satisfy judicial conscience to exercise the same. It is not a substitute to compensate for the lapses occasioned due to alleged oversight or negligence bereft of evident failure of justice that may accrue if such jurisdiction is not exercised.

21. The same thus leads the Court to the application moved by the petitioner and the reasons given therein necessitating re-examination of said witnesses. The petitioner has given a reason for seeking recall of PW-2 B.S. Sodhi, on the ground that material questions relating to the process of bank remained to

be put to the witness. It is claimed that there is a detailed process in the bank for opening of the account and all specimen signatures are to be fed in the computers and questions in this regard had not been put to the said witness. It is also pointed out that whenever a customer obtain an INB kit(Internet Banking Kit), a written application has to be submitted by a customer, however, no such application moved by the PW-15/Mukut Bihari was available on the file. Further, every employee is assigned specific work and duty and that there is separate Department in the bank to clear the cheque and that the details of such duties was again not available on the case file for which questions had to be put to the witnesses. It is also claimed that the prosecution witnesses i.e. PWs 13, 14, 15 and 16 are stated to have given hand written applications to the Bank Manager, however, the record of the same is not available on the case file. Further, the view report of CDS Belapur has also not been stated to be seen by PW-2/BS Sodhi. The witnesses thus need to be cross-examined on the same.

22. The Chief Judicial Magistrate Rohtak has given the following reasons while declining the said application:-

6. The applicants seeks recalling of the witnesses on the ground that some material questions relating to the process of bank were remained to be put to the witness. Likewise, one application moved by one Mukut Bihari on 27.06.2014 and 1.07.2017 were not on the case file. An enquiry was conducted in this case by the bank which revealed that no INB was issued on 27.06.2014 and, therefore, record of INB in this regard is very much essential in this case. It has been further asserted that PW16 Rajbir, PW15 Mukit Bihari, PW14 Sandeep Kumar and PW13 Azad Singh had given hand written applications to the Bank Manager but record of the same is not on the case file. It is also being asserted that the report of CDS Belapur is also essential for the just decision of the case and with these submissions request has been made to this application.

7. *The contention of the applicant that certain questions were left out to be asked to the witnesses is certainly a vague assertion. If such kind of contentions are entertained then the recording of evidence would never come to an end because at every stage the accused or the Opposite party would turn up with such frivolous contentions to recall the witnesses. Moreover, the evidence on record had been taken by the Ld. Court during the course of trial and no such point or contention was raised by the applicant at that point to time. It is a matter of record that prosecution witness has been completed in this case on 6.02.2017 and, therefore, case was adjourned to 13.02.2017 for recording the statement of accused under Section 313 Cr.P.C.*
8. *Moreover, the present case has been presented before this court pursuant to the order dated 20.08.2019 passed by the Ld. Sessions Judge, Rohtak. The elaborate evidence already taken on record renders this court is of the opinion that recalling of the witnesses named in the application is not necessary. Such objections or request for recalling of these witnesses should have been made by the accused at appropriate Stage. Now, the only question left to be considered is to adjudicate the present case in terms of Section 325 of Cr.P.C.*

23. Considering the reasons given by the petitioner for seeking recall of the said prosecution witness, no valid reasons have been given as to why PW-2 could not be questioned by the petitioner when such witness appeared before the Court considering especially that the cross-examination of the said witness itself runs into many pages. Besides, the witnesses are being sought to be re-examined so as to question them as regards handwritten applications/complaints given by some PWs to the Bank Manager that are not available on the file. It is incomprehensible to reason as to how can a person be confronted against a document that is not available on the file. The failure of the prosecution to produce

a document would always be subject to an inference against the prosecution. Once a document is not a part of the record, the examination of the witnesses is not required to prove the absence of such a document. The petitioner has also not been able to indicate any circumstantial prejudice on account thereof.

24. Insofar as the procedural requirements of the bank are concerned, there is no reason why only the said witness needs to be examined and questioned on the same. Bank is an Institution and the petitioner has every right to lead any witness in defence including calling any concerned official with the record in relation thereto.

25. Perusal of the case also shows that the petitioner has failed to demonstrate existence of any of the following essential aspects:-

- (a) The significance of the INB kit and how does it help the defence to establish or strengthen its case or even to dent the case of the prosecution;
- (b) The significance of the application submitted by other PWs for INB kits and how absence thereof affect the case of defence;
- (c) The allegations levelled against her and as to how the said evidence demolishes the allegations;
- (d) Whether the witness is the author of the said document and has taken a stand contrary to or at variance than what he had said in the proceedings;
- (e) Why the said questions could not be asked and how and why are such questions necessary to be put to the witnesses and to demonstrate that failure to question the witnesses on the same would occasion failure of justice;
- (f) Why leading such documents in defence evidence, that are part of record of the institution maintained in ordinary course would not serve the purpose of defence;

- (g) The real and substantial prejudice caused on failure to put the said questions and that it is not just a semblance of perceptive bias or prejudice;
- (h) Demonstrate that the need for cross-examination is not an attempt to fill a lacunae or to delay finalization of the proceedings;
- (i) Has also failed to point out as to whether the said questions are in furtherance to the defence already taken or not.

26. Needless to mention that even though Section 311 CrPC does not empower recalling or re-examination of witnesses at any stage but the existence of such a power does not mean that mere submission of an application invoking Section 311 CrPC is a reason good-enough to exercise such a jurisdiction and there is no need to establish how ends of justice shall stand defeated if such power is not exercised.

27. Learned counsel for the petitioner had also handed over a copy of the *zimni* orders passed by the Court as per which the statement of the petitioner under Section 313 CrPC had not yet been recorded. Hence, it would be open to the petitioner to summon such witness from the institution in his/her defence to place on record such complaints/instructions/office orders as may have been passed by the bank or are available in the official record. No reasons have been assigned as to why the petitioner cannot seek to lead the evidence in defence to bring such documents on record.

28. Further, insofar as the scope of Section 325(3) CrPC is concerned, even though the Sessions Judge, Rohtak had directed the Chief Judicial Magistrate, Rohtak vide his order dated 28.08.2019, however such a direction to exercise jurisdiction under Section 325(3) CrPC does not vest any fresh right in favour of the petitioner or to obligate the Chief Judicial Magistrate to necessarily recall and re-examine the witnesses, who have already been examined. The

discretion has to be formulated by the Chief Judicial Magistrate himself and it has to be guided by cardinal principle of law i.e. to secure the ends of justice. The said direction was only in the nature of the reiteration of the power conferred on a Chief Judicial Magistrate under Section 325(3) CrPC and was not a direction to necessarily recall/re-examine the witnesses. The necessity and desirability of such an action has to be seen by the Chief Judicial Magistrate.

29. In view of the fact noticed above and the position of law laid down by the Hon'ble Supreme Court, I am of the view that no justification/valid reasons exist on the file as would necessitate the application under Section 311 CrPC to be allowed. There is no error, illegality or infirmity or impropriety in the judgment passed by the Chief Judicial Magistrate, Rohtak.

30. Needless to reiterate that the observations recorded herein are only on the merits of the application submitted under Section 311 CrPC and so decided vide the impugned order. The same are not an expression on the merits of the case or the probative value of the evidence brought on record and also is not an expression against right of the accused to lead evidence in defence after recording of their statement under Section 313 CrPC.

The instant petition is accordingly dismissed.

(VINOD S. BHARDWAJ)
JUDGE

17/05/ 2022

S.Sharma(syr)

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