

CRM-M-40285 of 2022

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

CRM-M-40285 of 2022
Date of decision: 09.11.2022

Mohit

.....Petitioner

vs.

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present: Mr. Gautam Kaile, Advocate,
for the petitioner.

Ms. Gaganpreet Kaur, AAG, Haryana.

NAMIT KUMAR, J. (ORAL)

The instant petition has been filed by the petitioner under Section 482 Cr.P.C. read with Section 311 Cr.P.C. challenging the order dated 20.07.2022 passed by the Court of learned Additional Sessions Judge, Sonipat, whereby the application filed on behalf of petitioner-Mohit (accused) under Section 311 Cr.P.C. for recalling PW5 Vinod Kumar (complainant) for further cross-examination, has been dismissed.

Learned counsel for the petitioner contends that the petitioner is innocent and has been falsely implicated in the FIR and he has changed his counsel before the trial Court as the previous counsel for the petitioner-accused had not properly cross-examined PW5, complainant-Vinod Kumar and, therefore, an application under Section 311 Cr.P.C. was filed by him for recalling PW5 Vinod Kumar for further cross-

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examination, which has wrongly been dismissed by the trial Court.

I have heard learned counsel for the petitioner and perused the record.

It is apparent from the record that investigation was duly conducted and challan was presented. The complainant has been examined and cross-examined at length. The emphasis of the petitioner-accused for recalling PW5 Vinod Kumar (complainant) for further cross-examination is that there is a change of counsel, who found that some questions have not been put to the complainant which were material in nature. However, there is no gain saying that the complainant has been examined and enough opportunities have been given to the accused for cross-examining the complainant. It is settled proposition of law that statutory provisions of Section 311 Cr.P.C. are liberal in nature, however, neither the discretion under Section 311 Cr.P.C. can be exercised to delay the trial nor to fill up the lacunas in the case. Reliance is placed on ***V.N.Patil vs K.Niranjan Kumar and others, passed in SLP(Crl.)No.8965 of 2018 on 04.03.2021***, relevant para of which reads thus:

“15. The object underlying Section 311 Cr.P.C. 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

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power conferred under Section 311 Cr.P.C. has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion.”

To the same effect is the judgment of the Hon'ble Supreme Court in the case of **AG v. Shiv Kumar Yadav and another, 2015(4) R.C.R.(Criminal) 312** wherein the Hon'ble Supreme Court after discussing various judgments has held that mere change of counsel cannot be a ground to recall the witness. In the said judgment it was held as under: -

“10. It can hardly be gainsaid that fair trial is a part of guarantee under [Article 21](#) of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is

exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under [Section 311](#) Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

“13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to [Section 311](#) Cr.P.C., as well as [Section 138](#) of the Evidence Act. The same are extracted hereunder:

[Section 311, Code of Criminal Procedure](#)

*“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.”*

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[Section 138, Evidence Act](#)

*“138. **Order of examinations.**—Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him*

so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—*The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”*

14. A conspicuous reading of [Section 311](#) Cr.P.C. would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. [Section 138](#) of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of [Section 311](#) Cr.P.C. And [Section 138](#) Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-

examination at the desire of any person under [Section 138](#), will have to necessarily be in consonance with the prescription contained in [Section 311 Cr.P.C.](#) It is, therefore, imperative that the invocation of [Section 311 CrPC](#) and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under [the Code](#) for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

“17.1. 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?

17.2. The exercise of the widest discretionary power under [Section 311](#) CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under [Section 311](#) CrPC 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.

17.5. 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.

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

17.7. 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.

17.8. The object of [Section 311](#) CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. 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.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, 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.

17.11. 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.

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

17.13. 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.

17.14. The power 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 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.”

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

“6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in [Section 311](#) of the Code. After all the trial is basically for the prisoners and courts should

afford the opportunity to them in the fairest manner possible.”

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.”

To the same effect is the judgment of this Court in ***Paramjit Singh @ Pammi @ Jagdev Singh v. State of Punjab, 2014(16) R.C.R.(Criminal) 57.***

The facts and circumstances of the present case would clearly indicate that the application preferred by the accused-petitioner is only in order to prolong the trial and not for meeting the ends of justice. Learned trial Court appreciated the arguments raised by the petitioner and observed that the complainant had been examined in detail and the only ground for recalling is the change of counsel. I am of the opinion that the learned trial Court has committed no illegality in drawing its conclusion for dismissing the same.

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Resultantly, the petition being devoid of any merit is hereby dismissed.

09.11.2022
R.S.

(NAMIT KUMAR)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No