

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

Sr. No. 106

CRR-1910-2022 (O&M)

Date of decision : 16.9.2022

Harbhajan Singh

.....Petitioner(s)

VERSUS

State of Punjab

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.AS Jawandha, Advocate for the petitioner

AMAN CHAUDHARY, J.

CRM-34832-2022

The present application is for condonation of delay of 745 days in filing the present revision petition, which is supported by the affidavit of the petitioner.

In view of the reasons stated in the application that the earlier revision petition filed by the petitioner i.e. CRR-3649-2018, which was adjourned sine die on 8.1.2019 and later on, vide order dated 6.9.2022, it was dismissed as withdrawn with liberty to file afresh, the present application is allowed and the delay of 745 days in filing the revision petition is hereby condoned.

CRR 1910-2022 (O&M)

The challenge in the present petition is to the order dated 1.6.2018 passed by learned Additional Sessions Judge, Ludhiana, whereby the application under Section 311 Cr.P.C. filed by the petitioner for

recalling the Investigating Officer, namely, Surjit Singh (since retired) for cross-examination, has been declined.

As is apparent from the application seeking condonation of delay as also the grounds of revision, the petitioner had filed CRR 3649-2018 on 1.6.2018, which was adjourned sine die on 8.1.2019 and later on, it was dismissed as withdrawn on 6.9.2022 to file afresh with better particulars.

Learned counsel for the petitioner, on query posed by the Court submits that the prosecution evidence is still going on, which is also not disputed by the learned State counsel. Learned counsel has placed on record the application, Annexure P-3, filed under Section 311 Cr.P.C. to submit that the cross-examination of the witness, who was an eye witness of the incident, could not be done by the learned counsel for the petitioner before the trial Court on account of the fact that his counsel was suffering from severe throat infection. The relevant para No.2 of the same reads thus:-

“2. That at the time of examination of witness Surjit Singh (who is the IO of the case) counsel of applicant could not appear because he was suffering with severe throat infection, so under the circumstance, above mentioned, the applicant was not afforded an opportunity to cross examination the above witness. The mentioned witness is material witness, his cross- examination should be accorded by recalling him which is very much necessary, in the interest of law.”

Learned counsel further refers to Annexure P2, to submit that the presence of the learned counsel appearing on behalf of the petitioner before the trial Court has not been marked on account of the fact that he being been unwell, as stated in the application, however, the cross-

examination had been conducted by Sh.KS Mehta, Advocate for accused Simranjit Singh, whose presence is marked. The relevant portion of the statement reads thus:

“I had not noted down serial number of Hongkong dollars. I had not verified from immigration regarding arrival and departure of the victims and accused to India. I had not verified passports of the accused. It is wrong that police intentionally violated the rights of the accused available to him under the law. It is wrong that false case has been registered against the accused.
XXXmn by accused Harbhajan Singh.
No further question.”

Learned counsel submits that it is on account of the absence of the learned counsel for the petitioner that the cross- examination of the witness could not be conducted. He seeks only one opportunity to cross-examine PW8 Surjit Singh, Retired Inspector, which may even be subject to the costs.

Learned counsel relies on **Veena vs. State of Punjab**, CRM-M-28916-2003, decided on 8.7.2003 to contend that the petitioner should not suffer on account of the fault of the counsel.

Notice of motion.

At the asking of the Court, Mr.MS Atwal, DAG, Punjab accepts notice.

No order prejudicial to the rights of the complainant is being proposed to be passed by this Court, thus, there is no requirement for him being arrayed as a party respondent.

Heard the learned counsel for the parties.

A bare perusal of Annexure P2, in fact, reveals that since, the learned counsel for the petitioner was unwell and could not appear, his

presence has not been marked. In the application, the relevant part of which has been reproduced hereinabove, the factum of non-appearance of the counsel of the petitioner before the trial Court on account of suffering with severe throat infection has been mentioned. The impugned order reflects that the dismissal of the application under Section 311 Cr.P.C. is merely on account of the fact that the similar practice had been adopted by both the counsel for the accused while conducting examination and cross-examination of PW5 HC Amritpal Singh, wherein also no question was asked by Mr.NK Sharma, Advocate for accused Harbhajan (petitioner herein), the relevant portion of the order reads thus:-

“A similar practice was adopted by both the counsel for accused while conducting cross-examination of PW-5 HC Amritpal Singh, where also no question was asked by Mr.N.K. Sharma, Advocate, for accused Harbhajan Singh. Since already opportunity to cross-examine I.O. Surjit Singh has been given, present application is not maintainable and is accordingly dismissed.”

The concept of cross-examination is the most essential ingredient of fair trial. In the absence thereof, the examination of the witness, cannot be said to be complete and thus cannot be relied upon. It is well settled that the rights of the accused to prove his innocence are valuable and cannot be defeated. The denial whereof can gravely prejudice his defence. Similarly, the cross-examination is of equal importance in so far as the rights of the prosecution are also concerned. In this regard, it even becomes the bounden duty of the Court to ensure that both the examination and cross-examination should be conducted and in case required, for the aforesaid purpose, if the Court is of the view that somehow

may be due to inadvertence or otherwise, it could not be conducted, it can even *suo moto* summon such witness, in the interest of justice. In the absence of the evidence having been properly recorded, the same cannot even be scrutinized, so as to arrive at any conclusion in favour or against the accused.

The Court with regard to the evidence being recorded or its cross-examination cannot infuse its presumptions. The efforts at all times in the trial must be towards giving complete opportunity to both sides, so that the truth can be unearthed.

In so far as Section 311 Cr.P.C. is concerned, there may not be failure of justice on account of mistake of any party is its underlying object.

This view finds support from the judgment of the Hon'ble Supreme Court of India in case the of [Hoffman Andreas v. Inspector of Customs, Amritsar](#) (2000) 10 SCC 430 wherein it was held as follows:

“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.”

A Coordinate Bench of this Court in case of **Veena Rao** (supra), while dealing with somewhat similar set of facts, has observed thus:-

“2. The counsel contended that the statements of

PW1- ASI Kulwant Singh, who was the SHO of Police Station, Sadar Abohar and was witness of the alleged recovery and that of LC Usha Rani were recorded on 24.7.2002 but on that day, the defence counsel was not present and as such, they could not be cross-examined. Lateron, a request was made to recall them for cross-examination but the prayer was declined.

3. Since, the defence counsel was not present, so, the petitioner should not suffer for the fault of the counsel. In fact, cross-examination of ASI Kulwant Singh and LC Usha Rani is necessary for the just decision of the case. In such circumstances, this petition is allowed and order dated 20.12.2002 passed by Additional Special Judge, Ferozepur is set aside. The trial Court is directed to recall ASI Kulwant Singh and LC Usha Rani for their cross-examination by the petitioner.”

A reference can also be made to the judgment of the Hon'ble Supreme Court of India in case of '**Rafiq and another vs. Munshilal and another**' reported as AIR 1981 SC 140, the relevant reads thus:-

“What is the fault of the party who having done everything in his power expected of him, would because of his advocate... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent... We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted.”

Adverting to the facts of the case in hand, the cross-examination of PW8 was not conducted on behalf of the accused- petitioner herein, only on account of absence of his counsel, which specifically mentioned in para 2 of the application filed under Section 311 Cr.P.C., was that he was suffering with severe throat infection. Therefore, it cannot be said that there was any intentional or wilful default on his part also but was for the reasons beyond his control that he was unable to cause his

appearance. Despite this being specifically stated, the trial Court dismissed the application on the solitary ground that even at the time of cross-examination of PW5, the counsel for the petitioner as also that of accused Simranjit Singh had adopted similar practice, where no question was asked by the counsel for the petitioner herein. A presumption having been drawn by the trial Court that the counsel for the petitioner would not have cross-examined PW8, even if had he been present, is *ex facie* perverse. The reason of the absence of the counsel for the petitioner as stated in the application ought to have been considered by the trial Court while dealing with an application under such a significant provision to ensure that no failure of justice was caused. As has been submitted by the learned counsel for the petitioner that the prosecution evidence is still going on, in such an event, no prejudice will be caused to the complainant, if one opportunity is granted to the petitioner.

Fairness of trial being a virtue that is sacrosanct in the judicial system, the dismissal of the application of the petitioner would amount to denial of a fair opportunity to him to defend himself. There is even a duty cast upon the Court to arrive at the truth, one of the means for which, is the proper and complete examination of the witnesses.

In view of the aforesaid discussion, this Court is of the considered opinion that the impugned order is liable to be set aside. Accordingly, the present petition is allowed, subject to costs of Rs.10,000/- to be deposited with the trial Court, which will be disbursed to the complainant. The accused- petitioner is granted only one effective opportunity to cross-examine PW8- Surjit Singh. The requisite fee for

recalling the said witness will be borne by the petitioner himself.

Pending application(s), if any, shall also stand disposed of accordingly.

16.9.2022
gsv

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No