

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

CRR-1536-2021 (O&M)
Date of Decision:-29.8.2022

Dinesh Kumar

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE KARAMJIT SINGH

Argued by :-

Mr. Dharampal, Advocate for
Mr. Vivek Khatri, Advocate
for the petitioner.
Ms. Harpreet Kaur, AAG, Haryana.
Mr. Ajit Singh Lamba, Advocate for
respondents No.2 and 3.

KARAMJIT SINGH, J.

The present petition has been filed by the petitioner against the order dated 9.11.2021 passed by the Court of Ld. Additional Sessions Judge, Fatehabad, whereby the application moved by the petitioner/complainant under Section 311 Cr.P.C. for recalling PW-11 ASI Phool Singh, in order to get him declare hostile and thereafter to get him cross-examined by the prosecution in criminal case having FIR No.236 dated 12.5.2019 under Section 302 and 392 IPC read with Section 34 IPC Police Station City Tohana District Fatehabad was dismissed.

The brief facts of the case are that the aforesaid FIR was registered on the basis of the statement of petitioner/complainant Dinesh Kumar relating to murder of Joginder @ Bittu, whose dead body was found lying in the basement of the showroom of petitioner/complainant. The said FIR was registered against unknown persons, who committed murder of Joginder @ Bittu. During investigation, respondents No.2 and 3 namely Gurvinder @ Dariya and Lakhbir @

Lakha were arrested and after completion of investigation, the police presented challan against both of them. After commitment of the case, the charges were framed and during trial prosecution examined number of witnesses including PW-11 ASI Phool Singh and his statement was recorded on 7.4.2021. Thereafter petitioner/complainant filed an application on the same very day under Section 311 Cr.P.C. for recalling the aforesaid PW and to get him declared hostile and then to cross-examine him on behalf of the prosecution.

The aforesaid application was contested by the defence and reply was filed. After hearing the counsel for both the parties the learned trial Court dismissed the said application vide impugned order dated 9.11.2021.

Being not satisfied, the present petition has been filed by the petitioner/ complainant.

The present petition is contested by the respondents No.2 and 3.

I have heard the counsel for the parties.

The counsel for the petitioner submitted that PW-11 ASI Phool Singh was member of the police party headed by the investigating officer and they inspected the place of occurrence and during the said spot inspection blood lying at the spot was lifted and converted into sealed parcel, which was taken into possession by the police vide separate memo and the same was attested by PW-11 ASI Phool Singh and HC Rajesh Kumar. The counsel for the petitioner further submitted that the statement of the said PW under Section 161 Cr.P.C. was recorded by the investigating officer and the copy of the same is Annexure P-3. The counsel for the petitioner further submitted that the aforesaid spot inspection was conducted by the team lead by the investigating officer after the information regarding the murder was received by the police at about 5:50 am on 22.5.2019.

The counsel for the petitioner further submitted that however PW-11 ASI Phool

Singh while appearing in the witness box, in his cross-examination stated that the said spot inspection was conducted at about 1:00 am in the midnight and blood stains were lifted at 2/2:30 a.m on that day. The counsel for the petitioner further submitted that the deposition of PW-11 ASI Phool Singh to the extent of aforesaid timing is factually wrong. The counsel for the petitioner further submitted that at the time of recording of aforesaid statement of PW-11, the Public Prosecutor, who was conducting trial on behalf of the State did not make any request to declare the witness as hostile and as such after the completion of the recording of the evidence of PW-11, the application in question was moved by the petitioner/complainant under Section 311 Cr.P.C. on the same very day. The counsel for the petitioner further submitted that same was declined by the trial Court vide impugned order without appreciating the facts and circumstances of the case. The counsel for the petitioner further submitted that the trial Court is having vast powers under Section 311 Cr.P.C. to recall any witness at any stage of case before the pronouncement of judgment. The counsel for the petitioner further submitted that the impugned order is perverse and erroneous in law and thus deserves to be set aside.

On the other hand the counsel for the respondents No.2 and 3 submitted that there is no illegality in the impugned order. The counsel for the respondents No.2 and 3 further submitted that the testimony of PW-11 ASI Phool Singh was recorded in the presence of the Public Prosecutor by the trial Court and at that time no objection was raised by the Public Prosecutor and even he did not make any request to declare the said witness as hostile. The counsel for respondents No.2 and 3 further submitted that there is no discrepancy or inconsistency in the statement of PW-11. The counsel further submitted that the application under Section 311 Cr.P.C. was later on moved by the petitioner/complainant to fill up the lacuna and as such the same was rightly

dismissed by the trial Court. The counsel for respondents No.2 and 3 further submitted that now the trial is on its last legs as the statements of accused under Section 313 Cr.P.C. are already recorded and the case is fixed for defence evidence. The counsel for respondents No.2 and 3 further submitted that at the fag-end of the trial, no interference on behalf of this Court is called for.

I have considered the submissions made by the counsel for the parties.

The learned trial Court while passing the impugned order, observed as follows:-

“Admittedly, ASI Phool Singh has been examined as PW11 in the present case as prosecution witness. It is also admitted fact that present application has been given by the prosecution only after completion of evidence of ASI Phool Singh. From perusal of evidence of PW11, it is clear that he was examined in chief and thereafter, he was cross-examined. During his examination in chief, he did not give any time regarding recovery of blood stains from the spot. From perusal of the statement of witnesses under Section 161 CrPC, it is clear that no time was given by him regarding the said fact in his said statement. Mere giving of any time regarding said fact by said witness, during cross examination, whether correct or not, does not prove the fact that he has been helping the accused. It is a matter of arguments at the final stage to appreciate that what was the time of recovery of blood stains from the spot. At the present stage, no said findings can be given by the Court regarding the said fact. I have gone through the case laws relied upon by the prosecution and the same are not applicable in the present case being distinguishable on the basis of facts and circumstances of the present case. As per above said circumstances, the application in hand is hereby dismissed.”

FIR in this case was registered on the basis of the statement of petitioner/complainant dated 22.05.2019 against unknown persons. As per the

counsel for the petitioner, PW-11 has not deposed in consonance with his previous statement recorded under Section 161 CrPC and in order to remove the ambiguity which has appeared in his testimony, the petitioner intends to recall PW-11 by invoking provisions of Section 311 CrPC, which reads as follows:-

“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.”

Admittedly, the Trial Court is having wide powers under Section 311 CrPC to recall and re-examine the witness already examined, however, this discretionary power is to be exercised by the Trial Court judiciously and not arbitrarily. 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, as has been recently observed by the *Hon’ble Supreme Court in Criminal Appeal No.1021 of 2022 with MA No.1144 of 2022 in SLP(Crl) No.2239 of 2022 Varsha Garg VS. State of Madhya Pradesh and others* decided on 8.8.2022 which reads as follows:-

“27. The object underlying [Section 311](#) of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited

only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under [the Code](#) and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In [Section 311](#) the significant expression that occurs is 'at any stage of any inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

Undoubtedly, the power under Section 311 Cr.P.C. can be exercised by the Trial Court at any stage of the trial, prior to the passing of final judgment. In the instant case the application under Section 311 Cr.P.C. was moved by the petitioner/complainant on the same day on which the testimony of PW11 was recorded and as such it cannot be said that there was any delay on the part of the petitioner/complainant to invoke the provisions of Section 311 Cr.P.C.

The application moved by the petitioner/complainant under Section 311 CrPC has been primarily opposed by the counsel for respondents No.2 and 3 on the ground that the Court cannot fill the lacuna in the prosecution case with the aid of Section 311 CrPC. The Hon'ble Supreme Court in **Rajendra Prasad Vs Narcotic Cell through its Office Incharge, Delhi 1999 (3) RCR Criminal 440** observed as follows:-

"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 prone. A corollary of any such lapses 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 trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-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 same view has been recently reiterated by the Hon'ble Supreme Court in **Varsha Garg's** case (supra).

In the light of above, it is ample clear that the object underlying Section 311 Cr.P.C. is to arrive at a just decision of a case by summoning any witness or recalling and re-examining any person already examined.

In that view of the matter, this Court is of the opinion that the learned trial Court fell into error while passing the impugned order and dismissed the application moved by the petitioner-complainant under Section 311 Cr.P.C. while ignoring the aforesaid settled position of law.

Accordingly, the impugned order dated 9.11.2021 passed by the Court of Ld. Additional Sessions Judge, Fatehabad, is hereby set aside with a direction to the Trial Court to recall PW11 ASI Phool Singh, so that he be re-examined by the prosecution to remove the ambiguity which has crept in his deposition as has been spelled out by the counsel for the petitioner-complainant during his arguments. If any new material is introduced in the re-examination of PW-11 ASI Phool Singh, the accused would have a right of further cross-examination on that matter.

The revision petition stands disposed of in the aforesaid terms.

29.8.2022

Gaurav Sorot/P.Chawla

**(KARAMJIT SINGH)
JUDGE**

Whether reasoned / speaking? Yes / No

Whether reportable? Yes / No