

affidavit does not bear his signature. It was submitted that his testimony was very much essential for the just decision of the case and without his signatures on the affidavit, the same cannot be read in evidence. It was also stated in the application that no prejudice would be caused to the petitioner-accused and prayer for allowing the application was made.

The present petitioner contested the said application by filing his reply.

Learned Additional Sessions Judge, Rewari vide order dated 14.11.2022 allowed the application under Section 311 of the Code of Criminal Procedure.

Accordingly, the petitioner has filed the present revision petition assailing the said order dated 14.11.2022 passed by learned Additional Sessions Judge, Rewari.

I have heard learned counsel for the petitioner and perused the paper book with his able assistance.

Learned counsel for the petitioner has assailed the aforesaid order, primarily on the following grounds :-

- (i) *That the learned trial Court has erred in allowing the application under Section 311 of the Code of Criminal Procedure after the closure of prosecution evidence, which is delayed and hence, should not have been allowed;*
- (ii) *That the petitioner has no objection, if the unsigned affidavit of PW-8 Suresh Kumar is read in evidence;*
- (iii) *That the prosecution cannot be allowed to fill up the lacuna;*

Before considering the submission of the counsel for the petitioner, it is apposite to state that right from the inception of the judicial

system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice.

It is well settled that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.

Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried, is eliminated. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.

Section 311 of the Code of Criminal Procedure is a power given to the Court for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case. Power under this section is not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice.

Section 311 of the Code of Criminal Procedure reads as under:-

"311. Power to summon material witness, or examine person present:- Any court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or re-call 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".

As regards Section 311 of the Code of Criminal Procedure, recently, in ***Varsha Garg v. State of Madhya Pradesh, 2022(4) RCR (Criminal) 328***, Hon'ble Apex Court observed as under: -

"28. ...Section 311 provides that the Court "may":

- (i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and*
- (ii) Recall and re-examine any person who has already been examined.*

This power can be exercised at any stage of any inquiry, trial or other proceeding under the Cr.P.C. The latter part of Section 311 states that the Court 'shall' summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth

29. The first part of the statutory provision which uses the expression 'may' postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "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". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

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32. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasize that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest..."

Considering the submissions made by learned counsel for the petitioner, in the light of the settled law; I do not find any merit in the present revision petition for the reasons mentioned here-in-after.

The submission of learned counsel for the petitioner that the application under Section 311 Cr.P.C. is belated having being filed after more than 4 years of closing of prosecution evidence; does not merit any consideration in view of the settled law that the power of the Court under Section 311 Cr.P.C. is not constrained by the closure of evidence and it can be exercised at any stage of an inquiry, trial or other proceedings.

As regards the submission of counsel for the petitioner that he has no objection if the unsigned affidavit of EASI Suresh Kumar (PW8) is read in prosecution evidence; it is pointed out that concededly, the affidavit

Ex. PW8/A does not bear any signature of EASI Suresh Kumar (PW8). This court is of the considered view that such an unsigned affidavit is a nullity in the eyes of law and virtually there is no affidavit at all. Accordingly, mere no objection of counsel for the petitioner for reading such unsigned affidavit in prosecution evidence would not clothe such an unsigned affidavit with any legality or credence.

As regards the submission that the prosecution cannot be permitted to fill up the lacuna; it is noticed that the learned Additional Sessions Judge, Rewari, vide order dated 14.11.2022 allowed the application under Section 311 of the Code of Criminal Procedure filed by the prosecution by holding as under :-

“7. Argument on behalf of ld. Counsels for the accused that prosecution cannot be permitted to fill up the lacunae no doubt is a legal objection. However, in the facts and circumstances of the present case prayer of prosecution is not to fill lacunae but is to correct inadvertent mistake on its part. By recalling PW8 EASI Suresh Kumar no fresh material is being adduced by the prosecution and accordingly the argument that prosecution is trying to fill lacuna is without any merit.

8. Ld. Counsels for the accused have argued that the fact about non-signing the affidavit of PW8 was in the knowledge of prosecution and therefore, present application moved on 1.11.2022 i.e. four year after the examination of PW8 EASI Suresh Kumar as he was examined on 19.9.2018 is barred by limitation. Section 311 Cr.P.C. does not prescribe any particular stage at which application under Section 311 Cr.P.C. can be made. Rather application u/s 311 Cr.P.C can be made at any stage. No limitation has been prescribed, therefore, arguments raised on behalf of ld. Counsel is without merit.

9. *As per statement of PW8 EASI Suresh Kumar recorded under section 161 Cr.P.C on 29.11.2017 ASI Satish Kumar has deposited the case property of the present case in the malkhana i.e. one sealed parcel containing one led bullet with impression RK and on 1.12.2017 one another sealed parcel containing one country made pistol and one empty cartridge .315 bore having impression of RK. Whereas, PW8 EASI Suresh Kumar had tendered his unsigned affidavit Ex. PW8/A in his evidence, wherein, he has stated that on 29.11.2017 ASI Satish Kumar has deposited one countrymade pistol, one container of empty cartridge and one container having led bullet (Sikka Rondh) with impression of RC with him. Even recovery memo Ex.P15 shows that one country made pistol was recovered from accused Manish @ Monu on 1.12.2017 and this fact has also been proved by PW7 Mahinder Singh. On this account, it is necessary to re-examine PW8 for the just and proper decision of the case.”*

A perusal of above extracted order would show that as per the statement of PW-8 EASI Suresh Kumar recorded under Section 161 of the Code of Criminal Procedure on 29.11.2017, ASI Satish Kumar has deposited the case property of this case in the malkhana i.e. one sealed parcel containing one led bullet with impression '**RK**' and on 01.12.2017, one another sealed parcel containing one country made pistol and one empty cartridge .315 bore having impression of '**RK**'. Even recovery memo Ex. P15 shows that one countrymade pistol was recovered from accused Manish @ Monu on 01.12.2017. Further, it appears that this fact has also been proved by PW7-Mahinder Singh.

Considering the totality of circumstances, this Court is of the considered view that EASI Suresh Kumar (PW8) is an important and material witness and it is necessary to re-examine PW8 for the just and

proper decision of the case and in no manner, the re-examination of PW8 can be taken as filling up the *lacuna* in prosecution case. Thus, the learned trial Court was justified in allowing the application under Section 311 of the Code of Criminal Procedure and no fault can be found with the same.

No other point has been raised.

Accordingly, thiss revision petition is bereft of any merit and the same is hereby dismissed.

December 20, 2022
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(HARSH BUNGER)
JUDGE

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