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

CRM-M-57518-2022

Date of decision : 13.12.2022

Hardeep Singh

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

Present: Mr. Avtar Singh Bhatti, Advocate for the petitioner.

Mr. Amit Shukla, AAG, Punjab.

VIKAS BAHL, J. (ORAL)

This is a petition filed under Section 482 of Cr.P.C. for quashing of impugned order dated 03.12.2022 (Annexure P-5) passed by the Additional Sessions Judge, Hoshiarpur, vide which, the application filed by the petitioner under Section 311 Cr.P.C. was dismissed in FIR No.100 dated 19.10.2020 registered under Section 307 of Indian Penal Code, 1860 and Sections 25 and 27 of the Arms Act, 1959 at Police Station Garhdiwala, District Hoshiarpur, for recalling of the two prosecution witnesses who have not been cross-examined.

Learned counsel for the petitioner has submitted that in the

present case, FIR was registered on the statement of Gurpreet Singh and the allegations levelled in the FIR were that one Jasbir Singh had received one gunshot injury, which was found to be simple in nature. It is further submitted that on 21.01.2022 (Annexure P-2), the charges were framed and thereafter, on 18.07.2022, PW6 Jasbir Singh (injured/eye-witness) and PW7-Gurpreet Singh (complainant) who are the two most pertinent witnesses in the present case were examined however, counsel for the petitioner had not cross-examined the said two witnesses and had initially, sent his colleague for seeking an adjournment and thereafter, had appeared himself and moved an application to defer the cross-examination on the ground that the present petitioner and co-accused had not been produced from custody. The said prayer was declined. It is contended that on 02.09.2022, an application was moved under Section 311 Cr.P.C. with a prayer to recall the witnesses i.e. PW6 and PW7 for their cross-examination. It is further contended that by virtue of the impugned order dated 03.12.2022 (Annexure P-5), the said application under Section 311 Cr.P.C. has been dismissed and while doing so, the Additional Sessions Judge, Hoshiarpur, had taken note of the order dated 01.06.2022 passed in CRM-M-50284-2021, vide which the Coordinate Bench of this Court in a regular bail application filed by the petitioner, had directed the trial Court to record the statements of the eye-witnesses on priority basis. It is argued that the said two witnesses i.e. PW6 and PW7 are the star witnesses of the prosecution and in case, the petitioner is not granted an opportunity to cross-examine them, then fate of the

petitioner would be sealed without having been granted the opportunity to cross examine the most crucial prosecution witnesses. In support of his arguments, he has relied upon the judgment passed by the Hon'ble Supreme Court in **P. Sanjeeva Rao Vs. State of Andhra Pradesh, decided on 02.07.2012 in Criminal Appeal Nos.874 to 875 of 2012 (arising out of SLP(Crl.) Nos.4286 to 87 of 2011)**, to contend that on account of a mistake committed, the accused should not be made to suffer a penalty which is totally disproportionate to the gravity of the error committed and an opportunity to recall and cross-examine the witness is necessary, and serious miscarriage of justice would be caused in case the same is denied.

Learned counsel for the petitioner has also submitted that the case before the trial Court is now fixed for 19.12.2022 and in case, the said opportunity is granted to the petitioner, then every endeavour would be made by the petitioner to cross-examine the said two witnesses as expeditiously as possible and for the inconvenience caused to PW6 and PW7, he is ready to compensate them by paying an amount of Rs.5,000/- each, to PW6 and PW7.

On the other hand, learned State Counsel has opposed the present petition and submitted that in the present case, the Additional Sessions Judge, Hoshiarpur cannot be faulted as the direction was issued by the Coordinate Bench of this Court, in the regular bail application filed by the petitioner on 01.06.2022 in CRM-M-50284-2021, to the trial Court to make earnest efforts to record the statements of eye-witnesses on

priority basis and adjournment was to be granted only for justifiable reasons and since, it is the counsel for the petitioner who did not cross-examine the witnesses i.e. PW6 and PW7 thus, the order dated 03.12.2022 is legal and valid and therefore, the trial Court had rightly declined the prayer made by the defence counsel for an adjournment on 18.07.2022.

Learned counsel for the petitioner, in rebuttal to the abovesaid arguments, has submitted that the abovesaid regular bail application filed by the petitioner in which order dated 01.06.2022 was passed by the Coordinate Bench of this Court has been dismissed on 07.12.2022.

This Court has heard the learned counsel for the parties and perused the paper book.

The Hon'ble Supreme Court in ***P. Sanjeeva Rao's*** case (Supra), has held as under:-

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But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious

miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

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16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

17. In the result, we allow these appeals, set aside the orders passed by the Trial Court as also the High Court and direct that the prosecution witnesses No.1 and 2 shall be recalled by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant. In fairness to the counsel for the appellant, we must record that he assured us that given an opportunity to examine the witnesses the needful shall be done on two dates of hearing, one each for each witness without causing any un-necessary delay or procrastination. The Trial Court shall endeavour to

conclude the examination of the two witnesses expeditiously and without unnecessary delay. The parties shall appear before the Trial Court on 6th August, 2012.”

A perusal of above judgment would show that it has specifically been observed that merely on account of a mistake having been committed, the accused should not be penalized to an extent which is disproportionate to the gravity of the error committed by his lawyer and denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the accused therein without giving an opportunity to challenge the correctness of the version and credibility of the witnesses, which can be tested only when the testimony is put through the fire of cross-examination. The Hon'ble Supreme Court had also noticed the fact that recalling of the witnesses in the said case was being directed nearly four years after they had been examined in chief and the incident was nearly seven years old and that delay could make the human memory fail, but had further observed that taking into consideration the consequences of denial of opportunity to cross-examine the witnesses, the Court would prefer to err in favour of the accused/appellant therein in getting an opportunity, rather than protecting the prosecution against the prejudice and that fairness of the trial is a virtue that is sacrosanct in the judicial system and no price is too heavy to protect that virtue and accordingly, application under Section 311 Cr.P.C. therein was allowed.

The case of the present petitioner is on a better footing than the facts of the abovesaid case. In the present case, FIR was registered on 19.10.2020 on the complaint of Gurpreet Singh with respect to injuries

suffered by Jasbir Singh. The charges in the case were framed on 21.01.2022 and it was on 18.07.2022, when the said two star witnesses i.e. PW6 Jasbir Singh (injured/eye-witness) and PW7-Gurpreet Singh (complainant) had appeared and application moved by the counsel for the petitioner (accused) for deferring the cross-examination was declined and the case was thereafter adjourned to 03.08.2022 and thereafter, again adjourned to 02.09.2022 and the petitioner had moved an application on 02.09.2022 under Section 311 Cr.P.C. for recalling the said witnesses i.e. PW6 and PW7, which had been dismissed vide order dated 03.12.2022 passed by the Additional Sessions Judge, Hoshiarpur. Although, one cannot find any serious fault in the order passed by the Additional Sessions Judge, Hoshiarpur, inasmuch as the Court was bound to comply with the order dated 01.06.2022 passed by the Coordinate Bench of this Court in CRM-M-50284-2021 for recording the statements of the eye-witnesses as expeditiously as possible, but it is equally true that in case, the petitioner is not granted an opportunity to cross-examine the witnesses i.e. PW6 and PW7, who are the star witnesses in the present case, then the case of the prosecution would go unrebutted and the same would cause serious prejudice to the petitioner. The petitioner cannot be made to suffer for the fault of his counsel and cannot be condemned without giving an opportunity to cross-examine the said two witnesses. The law laid down by the Hon'ble Supreme Court in the aforesaid judgment would also fully support the case of the petitioner.

Keeping in view the abovesaid facts and circumstances, the

present petition is allowed and the impugned order dated 03.12.2022 (Annexure P-5) is set aside and the application of the petitioner filed under Section 311 Cr.P.C. is allowed and the trial Court is directed to recall the witnesses i.e. PW6 and PW7 and grant one effective opportunity to the petitioner to cross-examine the said witnesses. The petitioner and the State are also directed to fully assist the trial Court in expeditious cross-examination of the said witnesses. The same would be subject to the petitioner depositing costs of Rs.10,000/- with the trial Court within a period of six days from today and the trial Court is directed to release the said amount of Rs.10,000/- (Rs.5000/- each) in favour of PW6 Jasbir Singh and PW7-Gurpreet Singh.

13.12.2022*Pawan***(VIKAS BAHL)
JUDGE****Whether speaking/reasoned:- Yes/No****Whether reportable:- Yes/No**