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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-297-2023
DECIDED ON: 31.01.2023

JAGDISH SHARMA @ LOVELY

.....PETITIONER

VERSUS

STATE OF PUNJAB

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL.

Present: Mr. S.P.S. Khaira, Advocate
for the petitioner.

SANDEEP MOUDGIL, J (ORAL)

1. The present revision petition is directed against the order dated 11.01.2023 passed by the Special Court, Ludhiana in application under Section 311 Cr.P.C., for recalling the witnesses for cross-examination.
2. Having heard the submissions made by the learned counsel for the petitioner, it is an admitted position that the case was listed on 05.01.2023, but on that date, the bar was abstaining from work and the matter was adjourned to 06.01.2023 specifically for cross examination of the witnesses namely ASI Jarnail Singh and HC Avtar Singh.

Learned counsel for the petitioner has candidly stated before this Court that cross examination was though conducted on 06.01.2023, but certain important questions could not be put to the witnesses on account of the fact that there was elections of District Bar & Association and he was busy therein.

The attention of this court has been drawn to the impugned order passed by Judge, Special Court, Ludhiana, which indicate that due to strike in the Court, the counsel for applicant-petitioner could not cross examine the witnesses and it was fixed for 6th January,2023 i.e., the next day for cross examination of ASI Jarnail Singh and HC Avtar Singh. The record further depict that ASI Jarnail Singh was examined in chief as PW3 on 05.01.2023, whereas HC Avtar Singh was examined in chief as PW6. After conducting cross examination of other witnesses, it was deferred qua ASI Jarnail Singh and HC Avtar Singh, on the request of learned defence counsel for 06.01.2023 on which date it was duly completed.

While declining the application, Judge Special Court, Ludhiana has observed that sufficient opportunity was given to cross examine the witnesses which in fact had already been conducted by the learned defence counsel, the argument for another opportunity under the pretext of elections of district bar Association or any strike call on that day is an afterthought and a farce.

This Court has also examined from the aspect that as to whether any prejudice would be caused to either of the parties or conduct of fair trial would suffer, if the witnesses sought by the petitioner are not allowed to be recalled. The object of recalling of witnesses is the reserve power with the Court to prevent any injustice in the conduct of the trial at any stage, but such power has to be exercised for valid reasons, if the Court feels that injustice is caused to a party and above all the scope of power has to be considered from case to case. While considering the scope of powers to be exercised for summoning of material witness or to examine person present, as envisaged

vide Section 311 Cr.P.C., the Apex Court in **AG vs. Shiv Kumar Yadav & Anr., 2016 (2) SCC 402**, discussed and culled out and observed 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:

“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.

“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](#) Cr.P.C., 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](#) Cr.P.C., 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](#) Cr.P.C., 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](#) Cr.P.C., 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.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the [Advocates Act](#) and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

17. In *State (NCT of Delhi) v. Navjot Sandhu, 2005(3) Apex Criminal 49 : (2005) 11 SCC 600*, this Court held:-

*“167. we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, *Strickland v. Washington* makes it clear*

that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:

"Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Cf. Engle v. Isaac [456 US 107 (1982) at pp. 133-134]. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;...."

18. It may be proper to recall that the present case is in the category of cases where the trial is required to be fast tracked. In fact this Court directed in Shivanna [(2014) 8 SCC 916] as under :

"2. While we propose to consider this matter on merits after service of notice to the respondent-accused, we feel acutely concerned as to why the Union of India should not take initiative and steps to evolve a procedure for fast-track justice to be adopted by the investigating agencies and the Fast Track Courts by proposing amendments to [Cr.P.C.](#), for speedy justice to the victim.

3. Fast Track Courts no doubt are being constituted for expeditious disposal of cases involving the charge of rape at the trial stage, but we are perturbed and anguished to notice that

although there are Fast Track Courts for disposal of such cases, we do not yet have a fast-track procedure for dealing with cases of rape and gang rape lodged under [Section 376](#) IPC with the result that such heinous offences are repeated incessantly.

4. We are of the considered opinion that there is pressing need to introduce drastic amendments to [Cr.P.C.](#), in the nature of fast-track procedure for Fast Track Courts and here is an occasion where we deem it just and appropriate to issue notice and call upon the Union of India to file its response as to why it should not take initiative and sincere steps for introducing necessary amendment into [Cr.P.C.](#), 1973 involving trial for the charge of “rape” by directing that all the witnesses who are examined in relation to the offence and incident of rape cases should be straightaway produced before the Magistrate for recording their statement to be kept in sealed cover and thereafter the same be treated as evidence at the stage of trial which may be put to test by subjecting it to cross-examination. We are further of the view that the statement of victim should as far as possible be recorded before the Judicial Magistrate under [Section 164](#) Cr.P.C., skipping over the recording of statement by the police under [Section 161](#) Cr.P.C., which in any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded under [Section 313](#) Cr.P.C. The accused then can be committed to the appropriate court for trial whereby the trial court can straightaway allow cross-examination of the witnesses whose evidence were recorded earlier before the Magistrate.

5. What we wish to emphasise is that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate under [Section 164](#) Cr.P.C., and the same be kept in sealed cover to be treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to

the defence to cross-examine them with further liberty to the accused to lead his defence witnesses and other evidence with a right to cross-examination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast-track procedure to the Fast Track Court to resort to.

6. Considering the consistent recurrence of the heinous crime of rape and gang rape all over the country including the metropolitan cities, we are of the view that it is high time such measures of reform in [Cr.P.C.](#), be introduced after due deliberation and debate by the legal fraternity as also all concerned. We, therefore, deem it just and appropriate to issue notice to the Union of India through the Attorney General which the counsel for the petitioner is directed to serve by way of dasti summons. The matter be posted again on 3-9-2013 for further consideration.”

19. In continuation of the above, further order dated 25th April, 2014 [(2014) 8 SCC 913] was passed as follows :

“10.1. Upon receipt of information relating to the commission of offence of rape, the investigating officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under [Section 164 Cr.P.C.](#) A copy of the statement under [Section 164 Cr.P.C.](#), should be handed over to the investigating officer immediately with a specific direction that the contents of such statement under [Section 164 Cr.P.C.](#), should not be disclosed to any person till charge- sheet/report under [Section 173 Cr.P.C.](#), is filed.

10.2. The investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

10.3. The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

10.4. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

10.5. Medical examination of the victim: [Section 164-A](#) Cr.P.C., inserted by Act 25 of 2005 in [Cr.P.C.](#), imposes an obligation on the part of investigating officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under [Section 164](#) Cr.P.C.

11. A copy of this order thus be circulated to all the Directors General of Police of all the States/Commissioners of Police in Metropolitan cities/Commissioners of Police of Union Territories who are then directed to send a copy of this order to all the Police Stations-in-Charge in their States/Union Territories for its compliance in cases which are registered on or after the receipt of a copy of these directions. Necessary instructions by the DGPs/Commissioners of Police be also issued to all the Police Stations-in-Charge by the DGPs/Commissioners of Police incorporating the directions issued by us and recorded hereinbefore.”

Coming back to the proposition as involved in the instant case, wherein summoning of two witnesses has been asked for on the ground that some important questions could not be put by the defence counsel, the observations of the Apex Court in ***Mir. Mohd. Omar vs. State of WB, 1989***

(2) *RCR (Crl.) 346* would squarely cover the present petition, wherein the trial Court rejected the application, which was allowed subsequently by the High Court, but finally the Apex Court disapproved the course so adopted, while holding;

“16.Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for.”

This Court also cannot lose sight of the fact that the instant case is being tried by a Special Court and approach to deal with a case of such nature has to be different from other cases and the Court must remain alive, while evaluating evidence that no material effect on the veracity of the prosecution case or even the discrepancy in their statements would be fatal in nature.

Undoubtedly fair trial is the objective, and it is the duty of the Court to ensure such fairness and width of power under Section 311 Cr.P.C., is beyond any doubt, but there is no justifiable reason assigned by the applicant-petitioner in the case in hand to recall two witnesses, which would only prolong the proceedings, as it is not only on the principle “for ensuring fair trial” recall of witnesses is necessary, but there has to be tangible reasons to show how the fair trial would suffer without recalling the witnesses.

This Court is of the considered view that recalling of witness is not a matter of course and the discretion given to, it has to be exercised judiciously to prevent failure of justice and not arbitrarily. The plea for recalling of witness to advance justice has to be bona fide and must be

balanced carefully with the other relevant considerations including hardship to the said witness.

In the instant case, there is no basis or even a passing reference made by the petitioner before this Court to hold that any prejudice will be caused unless these witnesses are recalled. It will also be pertinent to record here that the power of judicial superintendence under Article 227 of Constitution of India and under section 482 of Cr.P.C., has to be exercised sparingly in a circumstance when there is patent error or gross injustice in the view taken by the subordinate Court, as has been held by the Supreme Court in *Jasbir Singh vs. State of Punjab, 2007(1) RCR (Criminal) 217*.

In view of the discussions made hereinabove, especially in the light of case law, this Court is convinced that there is neither any patent error in the approach adopted by the Judge, Special Court-trial Court rejecting the prayer for recalling nor any clear injustice, if such prayer is not granted.

Accordingly, the present revision petition is ordered to be dismissed.

(SANDEEP MOUDGIL)
JUDGE

31.01.2023

Meenu

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>