

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

CRM-M-28568 of 2020

Date of Decision: February 16, 2023

Gulab

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Rahul Jaswal, Advocate for the petitioner.

Mr. Parveen Kumar Aggarwal, DAG, Haryana.

DEEPAK GUPTA, J.(Oral)

By way of this petition filed under Section 482 Cr.P.C., prayer is made to quash impugned order dated 23.01.2020 (Annexure P.5) passed by learned Judicial Magistrate Ist Class, Panipat in a case title 'State vs. Sushil & Others' arising out of FIR No.438 dated 28.10.2015 registered at Police Station Madlauda, District Panipat under Sections 325/506/34 IPC, whereby application of the petitioner under Section 311 Cr.P.C for summoning the witnesses, was dismissed.

2. FIR in question was lodged on the complaint of Gulab, as per which he and his brother Bahadur were caused injuries by respondents No.2 and 3 on 17.09.2015 with rod and danda. Police investigated the matter and challan was filed against the accused. Prosecution evidence was closed on 06.08.2018. Case was fixed for defence witnesses, then petitioner moved an application dated 21.01.2020 (Annexure P.3) under Section 311 Cr.P.C for summoning the following witnesses:-

1. CMO Civil Hospital Panipat along with the record of

MLR No.388/SND/PNP/2015 of Gulab; and MLR No.389/SND/PNP/2015 of Bahadur.

2. Record keeper of Medical Record Department PGIMS Rohtak along with the record of X-ray and NCCT head and treatment record of injured Gulab CR No.385469 date of admission 18/09/2015 and date of discharge 24.09.2015.
3. Above-said application has been dismissed by the trial Court by way of impugned order on the ground that the petitioner was trying to delay the proceedings, as on the earlier applications, for the same purpose, prosecution was given opportunity to produce the evidence but it failed to avail the same.
4. It is contended by Ld. Counsel for the petitioner that learned trial Court failed to take into consideration the fact that Medical Officer Dr. Sandeep Goyal, who conducted MLR of both the injured Gulab and Bahadur on 17.09.2015 did not turn up for his examination, due to which application under Section 311 Cr.P.C was moved to call Record Keeper of Civil Hospital, Panipat along with the record. Besides, Dr. Ekta of PGIMS, Rohtak, who had conducted the X-ray examination and CT scan of injured Gulab, appeared in the witness box as PW5 but her cross-examination was not conducted due to some technical fault in the video conferencing and thereafter, she was summoned many times but she did not appear for cross-examination. Apart from this, Dr. Dinesh Dahiya, Medical Officer, PGIMS Rohtak, who treated injured- petitioner Gulab during 18.09.2015 to 24.09.2015 also did not appear before the Court and so, the Record Keeper of the Records Department of the PGIMS Rohtak

was summoned with necessary medical record for the sake of justice. It is contended further that trial Court failed to take into account the requirement of Section 311 Cr.P.C, as per which it is paramount consideration of the Court to do justice and that Court can examine the witnesses at any stage even if the same results in filling up of lacunae or the loopholes.

5. Despite notice served upon respondents No.2 and 3, there was no representation on their behalf.

6. Learned State Counsel appearing for respondent No.1 submits that whatever order is passed by the Court shall be acceptable to the State.

7. I have considered submissions of both the sides and have perused the record.

8. 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 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.”

9. A bare perusal of the above-said provision would reveal that this Section has two parts. Under the first part, the Court “may” -

(i) summon any person as a witness or to examine a person in

attendance, though not summoned as a witness; or

(ii) recall and re-examine any person, who has already been examined.

This power can be exercised by the Court at any stage of inquiry, trial or other proceedings under the Cr.P.C.

10. The second part of Section 311 Cr.P.C 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.

11. As has been held by Hon’ble Supreme Court in ***Varsha Garg Vs. The State of Madhya Pradesh and others – Criminal Appeal No.1021 of 2022 with MA 1144 of 2022 in SLP (Crl.) No.2239 of 2022 decided on 08.08.2022***, the first part of the statutory provision using the expression “*may*” postulates that power can be exercised at any stage of inquiry, trial or other proceedings. 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 just decision of the case, constitute the touchstone which must guide the decision of the Court. Though the first part of Section 311 Cr.P.C is discretionary but the latter part is obligatory.

12. In above noted ***Varsha Garg’s Case (supra)***, it has been further held by Hon’ble Supreme Court that the power of the Court is not constrained by closure of the evidence. The broad powers under Section 311 Cr.P.C are to be governed by the requirement of justice. Said power

must be exercised wherever the Court finds that any evidence is essential for the just decision of the case. Statutory provision goes on to emphasise that the Court is not 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 realisation of justice is manifest.

13. In ***Zahira Habibullah Sheikh Vs. State of Gujarat, (2006) 3 SCC 374***, Hon'ble Supreme Court has reiterated the extent of powers under Section 311 Cr.P.C and held as under:-

“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.”

14. Hon’ble Supreme Court has further held as under:-
“44. The power of the court under [Section 165](#) of the Evidence Act is in a way complementary to its power under [Section 311](#) of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. [In Mohanlal v. Union of India](#) this Court has observed, while considering the scope and ambit of [Section 311](#), that the very usage of the words such as, —any court, —at any stage, or —any enquiry or trial or other proceedings, —any person and —any such person clearly spells out that the section has expressed in the widest- possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions [of the Code](#). The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth

irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of [Section 311](#) but only to sub-serve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

15. Regarding the oftenly taken objection of filling up lacunae Hon’ble Supreme Court, in ***Varsha Garg’s Case (supra)***, referred to ***Zahira Habibullah Sheikh’s case (supra)*** reiterated in ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd., (2008) 11 SCC 108***, wherein the said objection was specifically dealt with and it was observed that the resultant filling of loopholes on account of allowing an application under Section 311 Cr.P.C is merely a subsidiary factor and the Court’s determination of the application should only be based on the test of the essentiality of the evidence. It was held as under:-

“28. The court is not empowered under the provisions [of the Code](#) to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses

as directed by the court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.”

16. In ***Rajendra Prasad Vs. Narcotic Cell, (1999) 6 SCC 110***, it has been held by Hon’ble Supreme Court as under:-

“8. 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 foreclosed 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.”

17. Apart from above, in ***Varsha Garg’s Case (supra)***, Hon’ble Supreme Court also dealt with the objection with regard to the stage at which the application under Section 311 Cr.P.C is moved and referred to ***Swapan Kumar Chatterjee Vs. Central Bureau of Investigation, (2019) 14 SCC 328***, wherein it was observed as under:-

“11. It is well settled that the power conferred under [Section 311](#) should be invoked by the court only to meet the ends of justice. The

power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.”

18. The Court is vested with a broad and wholesome power, in terms of Section 311 Cr.P.C to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. It has been held by Hon’ble Supreme Court in ***Zahira Habibullah Sheikh’s case (supra)*** that Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the

prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system and the Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

19. Keeping in view the above said legal position and advertent to the facts of the present case, it is noticed that although in the impugned order, it is observed that earlier also two applications under Section 311 Cr.P.C were moved to call the Record Keeper to lead evidence pertaining to the record of MLRs, which had been allowed and that despite availing opportunities, prosecution has failed to examine the witness but learned Court did not at all mention as to whether any summons were issued to the concerned witnesses and as to what was the report thereon. There is no mention in the impugned order as to what effective steps as per law were taken to ensure the service of the witnesses sought to be summoned under Section 311 Cr.P.C., which was necessary for the Court to do, as Court cannot be a mute spectator to play in the hands of the prosecuting agency.

20. In a case like present one, where the accused is sought to be prosecuted under Section 325 IPC, one can easily imagine the fate, in case the MLR and X-ray report etc., are not proved on record. The complainant is moving application time and again to call the relevant witnesses so as to prove the MLRs and X-ray reports but in case

prosecution is not producing those witnesses, it was incumbent on the Court to take effective steps to ensure their presence. Interestingly, one of the witnesses Dr. Ekta, who had conducted the radio-logical examination of the injured Gulab appeared as PW5 and her cross-examination had to be deferred due to some technical snag and, thereafter, she did not appear despite many opportunities. It was incumbent upon the Court to ensure her presence even by taking coercive steps against the witness in case she was intentionally avoiding to appear in the Court.

21. As the legal position has been noticed, stage of the case at which the application under Section 311 Cr.P.C. is moved, is not relevant. It is the essentiality of the evidence, which is important. It is not the case of any of the sides that MLRs or X-Ray reports etc., which the petitioner wants to get proved were not part of the challan. In case prosecution has not proved the same by examining the relevant witnesses, asking the Court to summon the relevant witnesses to prove that record, cannot be considered as filling up lacunae. The repeated applications moved by the complainant, shows his hapless condition as despite moving the court time and again, prosecution is not taking interest to examine the witnesses and unfortunately, the Court appears to be falling in line with the prosecution indirectly.

22. As has been observed earlier, it is mandatory for the Court to examine the witnesses when it is essential for the just decision of the case. The second portion of Section 311 Cr.P.C is mandatory in nature.

23. Consequent to the entire discussion as above, the impugned order 23.01.2020 (Annexure P.5) is hereby set aside. The learned trial

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Court is directed to take necessary steps in the light of this order so as to ensure the presence of concerned witnesses as mentioned in application moved under Section 311 Cr.P.C by the complainant, which was also endorsed by the prosecution.

Disposed of.

February 16, 2023
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(DEEPAK GUPTA)
JUDGE

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