

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-19697-2019

Reserved On: 10.04.2023

Pronounced on 11.08.2023

Amritbir Singh

... Petitioner

VS.

State of Punjab

... Respondent

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL

Present: Mr. PS Ahluwalia, Advocate for the petitioner

Mr. Mohit Thakur, AAG Punjab

Sandeep Moudgil, J.

(1) This petition under Section 482 Cr.PC has been filed by the petitioner seeking to set aside the impugned order dated 02.04.2019 (Annexure P8) whereby the trial court has chosen to recall PW6 Manjinder Singh in case FIR No.122 dated 12.08.2010 registered at PS Kotwali Nabha, District Patiala for offences punishable under Sections 302 IPC and Section 25 of the Arms Act, for the 4th time after almost 8 ½ years and that too after disclosing the defence by the petitioner.

(2) The factual matrix of the case is that FIR No.122 dated 12.08.2010 was registered against unknown persons, on the statement of Bhagwan Singh in a case of blind murder of Hamir Singh, Iqbal Singh, Jaswinder Kaur w/o Iqbal Singh and Gurmanvir Kaur d/o Iqbal Singh. During the course of investigation, the petitioner was arrayed as accused and the investigating agency had filed a final report against the petitioner under Section 173 CrPC. Evidence of one Manjinder Singh SI, PW6 came to be recorded on 11.07.2011 (Annexure P2). Thereafter, the petitioner was

acquitted by the trial court vide judgment dated 28.04.2012, however, the said judgment was set aside by this Court vide judgment dated 08.07.2014 passed in CRM-M-52009-2012 in/and CRA-D-914-SB-2012 (Chamkaur Singh vs. Amritbir Singh & Anr.) (Annexure P4) and the matter was remanded to the trial court for afresh decision after considering the scientific evidence which was allegedly withheld by the prosecution. In pursuance to the remand order, re-trial was conducted and Manjinder Singh was again recalled for examination by the trial court and his evidence was recorded on 03.03.2015 (Annexure P5). Again during the course of arguments, the trial court, exercising its powers under Section 311 read with Section 326 CrPC and Section 165 of Evidence Act, passed an order dated 15.01.2019 (Annexure P6) recalling SI Manjinder Singh along with relevant record, for the second time after the case was remanded by this Court, which came to be recorded on 21.01.2019 and 23.01.2019 (Annexure P7). Thereafter supplementary statement under Section 313 CrPC was recorded and the arguments were heard at length and at this juncture, the trial court passed impugned order dated 02.04.2019 (Annexure P8) recalling PW6 Manjinder Singh for further clarification. The petitioner sought an adjournment before the trial court on the ground of challenging the validity and legality of the order dated 02.04.2019 recalling PW6 Manjinder Singh for the fourth time. Hence this petition.

(3) Learned counsel for the petitioner submits that a bare perusal of the record would reveal that initially the FIR came to be registered way back in the year 2010 and as such, recalling of the witness, after about 9 years of

FIR, more-so when final arguments have been advanced would clearly tantamount to filling up the lacuna and infringement of the right of speedy and fair trial vested with the accused. It is strange that the witness was examined for the first time in the year 2011 and thereafter the petitioner was acquitted against which judgment, the prosecution approached this Court under Section 391 CrPC on the ground that they could not produce the relevant material and hence sought an opportunity to re-examine the witnesses. That request of the prosecution was acceded to and the matter was remanded back for re-trial. Thereafter the witness was examined for the second time in the year 2015. After the trial was concluded for the second time and the arguments were being addressed, due to alleged ambiguity which resulted in recalling of the witness PW6 Manjinder Singh SI who was re-examined for the 3rd time. Thereafter, Manjinder Singh stepped in the witness box in the year 2019.

(4) It is further contended that in the present case, the record would reveal that no question was put by the Public Prosecutor but the witness was examined by the Court. He has argued that once the witness has been examined and re-examined on three different dates and still there is an ambiguity in evidence or the defence has been able to impeach the creditability of the witnesses, it shall be recalled so as to fulfill the lacuna. Such a practice being adopted clearly violates the right of fair trial.

(5) Further, it is urged that the sequence of events would indicate that examination and re-examination of a material witness is an unending exercise. On an earlier occasion also, an application U/s 311 of Cr.P.C. was

allowed by the trial Court and the same was challenged before this Court and the same was quash by observing that recalling of witness-Sadik Ansari would amount to filling up the lacuna. A copy of order dated 31.08.2017 is appended with the petition as Annexure P10.

(6) Learned counsel for the petitioner also asserted that the basic principle of criminal jurisprudence is that on the commencement of trial, the entire material available with the prosecution has to be disclosed to the accused so as to afford an opportunity to defend himself and such a right accrues to the accused as a constitutional guarantee of fair trial under Article 21 of the Constitution of India and on account of the fact that in criminal jurisprudence every presumption of innocence. It is urged that in the present case, the presumption of innocence would stand fortified by the judgment of acquittal having been passed by the trial Court in favour of the petitioner, wherein the prosecution concededly did not produce the relevant material and sought the indulgence of this Court under Section 391 of Cr.P.C., whereby another opportunity was afforded to it to produce all the relevant material. Thereafter, witness was recalled for the second time and still the prosecution could not clarify if, there was any ambiguity and whatsoever. Mr. Ahluwalia submits that it is a strange procedure that after recording the statement of accused under Section 313 of Cr.P.C. and another supplementary statement under Section 313 of Cr.P.C., the trial Court has chosen to recall a witnesses during the course of arguments so as to fill-up the lacuna in the trial. Even that was not objected to by the accused but this continuous exercise where one after the another witness has been recalled

multiple time ever and when the accused during the course of arguments disclosed his defence is a clear and absolute violation of right of fair trial. Such a procedure would result in a situation where in every criminal trial, the prosecution would keep on moving the applications after applications to counter the defence. Such a procedure would frustrate the very purpose of criminal trial and the mandate of the statutory framework so prescribed under the Code of Criminal Procedure and Indian Penal Code.

(7) Notice of motion was issued on 03.05.2019 and the operation of the impugned order dated 02.04.2019 was ordered to be stayed.

(8) Reply dated 07.08.2019 has been filed by Varinderjeet Singh, PPS, DSP, Circle Nabha wherein it has been averred that the trial court summoned PW6 SI Manjinder Singh and his evidence was recorded on 03.03.2015 by the trial court and the case came up for arguments on 02.04.2019, on which date, the trial court observed as under:-

"During the course of arguments learned defence counsel submitted that PW-6 SI Manjinder Singh, Forensic Expert has stated that the chance print lifted by him from the iron rod Ex.P3 was on the one end of the said rod. He further submitted that in fact from the iron rod Ex.P3, it seems that he had lifted the alleged print from the middle of the iron rod and not from any of the ends thereof. The learned Public Prosecutor could not clarify this fact and he submitted that only PW6 Manjinder Singh can clarify this position in this regard".

(9) Learned State counsel would argue that since Scientific crucial point (Forensic Expert) was involved in this case, therefore, the trial court

has ordered to re-summon PW6 SI Manjinder Singh to clarify the scientific point. Thus, there is no illegality in the order dated 02.04.2019.

(10) Heard learned counsel for the parties and gone through the record.

(11) Section 311 of the Code of Criminal Procedure, 1973 (for short 'the Code') provides for the power of the court to summon material witness or examination person present. It reads as follows:-

"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."

(12) The first part of this Section which is permissive, gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

(13) A conscious 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.

(14) A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”.

(15) By using the said expression “any” as a pre-fix to the various expressions mentioned above, it can be easily inferred 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. 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 whims of any person under, will have to necessarily be in consonance with the prescription contained in [Section 311](#) Cr.P.C.

(16) It is, therefore, imperative that the invocation of [Section 311](#) Cr.P.C. 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.

(17) 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, 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.

(18) 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.

(19) In **Rajaram Prasad Yadav vs. State of Bihar 2013(3) RCR (Crl.) 726**, the Supreme Court set out the following principles to be borne in mind while dealing with the application under Section 311 CrPC read with Section 138 of the Evidence Act:-

- a) 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?*
- b) 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 speculative presentation of facts, as thereby the ends of justice would be defeated.*
- c) 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.*

- d) 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.*
- e) 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.*
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- g) 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.*
- h) 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.*
- i) 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.*
- j) Exigency of the situation, fair play and good sense should be the safe guard, 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.*
- k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) 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.

(20) The court can summon the witness under this section, at any stage of the trial and such a witness has to be called as a prosecution witness, if, summoned on behalf of prosecution, likewise defence witness if, summoned on behalf of the accused and not as court witness. Even after both parties have closed their cases, it is open to the magistrate to summon any person as a witness if his evidence appears to him to be essential to the just decision of the case. The court can summon the witness under section 311, at any stage of the trial. The court can summon the witness under this Section, at any stage of the trial and such a witness has to be called as prosecution witness, if summoned on behalf of prosecution and defence witness if summoned on behalf of the accused and not as court witness. Even after both parties have closed their evidences it is open to the magistrate to summon

any person as a witness if his evidence appears to him to be essential to the just decision of the case. Once it is found that the evidence is essential for the just decision of the case, the witness can be recalled at any time before pronouncement of the judgment, the time factor would not come in the way. A material witness can be summoned even during final arguments, even where the case is fixed for judgment, while writing a judgment if the court finds that the examination of the witness is necessary for the just decision of the case as been held by the Allahabad High Court in **Chootey Badri Prasad vs.State of U.P. 2006 CrLJ 711(713).**

(21) **P.Chhaganlal Daga vs. M.Sanjay Shaw, (2003) 11 SCC 486,** was a case where though arguments were concluded and the case was posted for judgment, since the complainant had moved the trial court for reception of additional materials, in exercise of powers under Section 311 of the Code of Criminal Procedure, as the materials were necessary for a just and proper decision in that case, it was proper to allow the petition to meet the ends of justice. The Supreme Court held that there is no error on the part of the trial court in allowing the petition filed under Section 311 Cr.P.C. The Supreme Court held as follows:-

"...The only factor which should govern the court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word "any" at different places. This would also indicate the widest range of power conferred on the court in that matter..."

(22) In **S.R. Sinha vs. Mrinal Sengupta, 2001 SCC (Cri) 1581**, the Hon'ble Apex Court has held that there is no bar against the examination of a witness, even at a stage subsequent to the recording of a statement of the accused. It further held as follows:-

"It is difficult to appreciate the approach of the High Court in the revision application for the reason that there is no bar against the examination of a witness even at a stage subsequent to the recording of the statement of the accused in exercise of power under Section 311 of the Criminal Procedure Code..."

"...The power conferred 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 great caution and circumspection. The very use of words such as "any Court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning recalling of the said witness is in fact, essential to the just decision of the case."

(23) In **Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178**, the Supreme Court held that if the conditions of Section 311 are satisfied, the Court can call a witness not only on the application of either part, but on its own motion. The determinative factor is whether the summoning/recalling of the witnesses 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 exercise of the power 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 a accused. The section is a general section which applies to all proceedings, inquiry and trials under the court and empowers the Magistrate to issue any witness and any such of proceeding, trial or inquiry. The Apex Court further held that:-

"It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is necessary by it for a just decision of the case."

(24) In so far as Section 326 CrPC is concerned, Section 326 CrPC is part of the general provisions as to inquiries and trials contained in Chapter XXIV of the Code. It is one of the important principles of criminal law that the Judge who hears and records the entire evidence must give judgment. Section 326 is an exception to the rule that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. The section is intended to meet the case of transfers of Magistrates from one place to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer. Section 326 empowers the succeeding Magistrate to pass sentence

or to proceed with the case from the stage it was stopped by his preceding Magistrate. Under Section 326(1), the successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he may recall that witness and examine him, but there is no need of a retrial.

(25) **In Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal, (2011) 9 SCC 638**, the Supreme Court in paragraph 19 dealt with the effect of introduction of Section 326 CrPC and held as under:-

"19. The cardinal principal of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. It is so stated by this Court in the decision in Pyare Lal v. State of Punjab (Supra) This principle was being rigorously applied prior to the introduction of Section 350 in the Code of Criminal Procedure, 1898. Section 326 of the new Code deals with what was intended to be dealt with by Section 350 of the old Code.

20. From the language of Section 326(3) of the Code, it is plain that the provisions of Sections 326(1) and 326(2) of the new Code are not applicable to summary trials. Therefore, except in regard to those cases which fall within the ambit of Section 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case de novo. In this view of the matter, the High Court should have ordered de novo trial."

(26) It thus culls out 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 reexamination 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. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is 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.

(27) However, in order to enable the court to find out the truth and render a just decision, the court by exercising its discretionary authority provided under Section 311 CrPC, at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute to fight shy off the probability of a judgment based on inchoate, inconclusive and speculative facts which would ultimately defeat the ends of justice.

(28) In the present case, prior to acquittal of the petitioner vide judgment dated 28.04.2012, evidence of PW6 SI Manjinder Singh was recorded on 11.07.2011. Thereafter, the judgment of acquittal was challenged before this Court which was set aside and the matter was

remanded on the ground that some of the material witnesses were not examined, improperly given up or resiled and the material scientific evidence was kept away from the trial court. On re-trial, the court recalled the said witness PW6 Manjinder Singh and recorded his evidence on 03.03.2015 (Annexure P5). Thereafter, the prosecution evidence was concluded and statement of the petitioner was recorded under Section 313 CrPC. The trial court proceeded with the arguments and it was during the course of hearing, that the trial court vide order dated 15.01.2019 (Annexure P6) again recalled the said witness in exercise of powers under Section 311 CrPC read with Section 326 CrPC and Section 165 of Evidence Act by observing as under:-

“Today, learned Public Prosecutor for the State apprised the Court of the prosecution version and from the testimony of PW6 SI Manjinder Singh, Finger Print Expert, it is made out that he had allegedly taken the photograph of the prints from the rod recovered from the place of occurrence. The prosecution has relied upon the report of Director Finger Print Bureau, Phillaur, whereby it is opined that the thumb impressions in the photograph Mark A tally with the thumb impressions of the accused in the photograph Mark A/A. PW6 SI Manjinder Singh in his statement recorded on 3.3.2015 stated that duplicate positive print photograph prepared from the original negative by Finger Print Bureau, Phillaur is Ex.PW6/A. He has further stated that original prints developed by him were lost during the investigation and transit.

The said evidence is of vital importance for decision of the case. Since I was of the tentative opinion that PW6 SI Manjinder Singh will have to be recalled and it is necessary to summon the relevant record from Finger Print Bureau, therefore, I have heard learned Public Prosecutor and learned

defence counsel on this aspect. Learned defence counsel could not dispute the proposition that as per provisions of Section 311 read with Section 326 of the Criminal Procedure Code and Section 165 of Evidence Act, the Court can recall the witness already examined and can summon any other additional witness. Accordingly, prosecution is directed to ensure the presence of PW6 SI Manjinder Singh for further examination as well as that of concerned official of Finger Print Bureau with complete record i.e. negatives and positive photograph pertaining to this case lying in the said office on 21.1.2019. The prosecution can get the summons issued from the Court, if required.”

(29) Thereafter, the trial court vide impugned order dated 02.04.2019 again summoned the said witness for further clarification. The said order reads as under:-

“During the course of arguments learned defence counsel submitted that PW6 SI Manjinder Singh, Forensic Expert has stated that the chance print lifted by him from the iron rod Ex.P3 was on the one end of the said rod. He further submitted that in fact from the iron rod Ex.P3, it seems that he had lifted the alleged print from the middle of the iron rod and not from any of the ends thereof. The learned Public Prosecutor could not clarify this fact and he submitted that only PW6 Manjinder Singh can clarify this position in this regard. It is ordered that PW6 Manjinder Singh be produced before this Court on 3.4.2019.”

(30) From a combined perusal of both the above-reproduced orders passed by trial court, it can be convincingly determined that the trial court chose to recall the prime witness PW6 Manjinder Singh being Finger Print Expert since he had allegedly taken the photograph of the prints from the rod

recovered from the place of occurrence. The prosecution had relied upon the report of Director, Finger Print Bureau, Phillaur, whereby it is opined that the thumb impressions in the photograph Mark 'A' tally with the thumb impressions of the accused in the photograph Mark A/A. PW6 SI Manjinder Singh in his statement recorded on 3.3.2015 stated that duplicate positive print photograph prepared from the original negative by Finger Print Bureau, Phillaur is Ex.PW6/A and the original prints developed by him were lost during the investigation and transit. The evidence being of vital importance for decision of the case, the trial court thus recalled PW6 along with relevant record from Finger Print Bureau for further examination.

(31) Further during the course of argument on 02.04.2019, since the Public Prosecutor was not in able to clarify the fact that as to whether PW6 SI Manjinder Singh lifted the alleged print from the middle of the iron rod or from any of the ends thereof, the trial court was left with no option but to again recall PW6 for clarification since a scientific crucial point (forensic expert) was involved in the case.

(32) It is the case of the prosecution that counsel for the petitioner himself had raised a scientific question before the trial court during argument which essentially required clarification by an expert. Since the trial court did not get assistance from the prosecution on a scientific question, so the trial court deemed it appropriate to re-summon PW6 SI Manjinder Singh. The petitioner cannot be allowed to blow hot and cold and cannot back from the stand taken by him before the trial court.

(33) In fact, Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 326 is that the second Magistrate need not rehear the whole case and he can start from the stage the first Magistrate left it. However, a bare perusal of sub-section (3) of Section 326 makes it more than evident that sub-section (1) which authorises the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub-section (3) of Section 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another, his jurisdiction ceases in the former station when the transfer takes effect."

(34) The provisions of section 165 and this section confers jurisdiction on the court to act in the aid of justice, they are said to be complementary to each other. In **Himanshu Singh Sabharwal v. State of M.P. and Ors., AIR 2008 SC 1943**, the apex court observed that if fair trial envisaged under the Code is not imparted to the parties and court has reasons to believe that prosecuting agency or prosecutor is not acting in the requisite manner the court can exercise its power under section 311 of the Code or under section 165 of the Indian Evidence Act, 1872 to call in for the material witness and procure the relevant documents so as to sub serve the cause of justice.

(35) In “Meera Devi & Others v. Jitender & Others” (2012) 5 SCC 777, it was held that the highest ideal of the court must be nothing but the quest of truth. It stated that Section 165 of the Indian Evidence Act provide the judge the power put in order any question to the witness or the party to the case irrespective of form and relevancy of facts if the judge decides for finding out the truth.

(36) The jurisdiction of the court must obviously be dictated by exigency of the situation, fair play and good sense appear to be the only sage guide and that only the requirements of justice command the examination of any person which would depend to the facts and circumstances of each case. It is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case. Such power may be exercised at any time. However, the power is circumscribed by the principle underlying the section, that is, the evidence to be obtained must be essential for just decision of the case. There is no limitation on the power of the court arising from the stage to which the trial may be reached, provided the court in bonafide of the opinion that for the just decision of the case, the step must be taken. This section confers a wide discretion to the court to act as the exigencies of justice require, the discretion conferred by the court has to be exercised judicially. It is well settled that if fair trial is not imparted and the trial court has reasons to believe to proceed as such, it can exercise its power under section 311 of the Code or under Section 165 of the Indian Evidence Act, 1872 to call in for the material witness and in order to discover or to obtain proper proof of relevant facts, the trial court can ask any question, at any time, to any witness; and may order the production of any

document or thing without entitling any of the parties to make any objection to any such question or order.

(37) In view of the foregoing discussion, this Court is of the unambiguous and considerate opinion that there is no illegality committed by the trial Court in recalling PW6 SI Manjinder Singh since, in the facts and circumstances of the case and when the Public Prosecutor was unable to clarify the factual and scientific point involved in the case, it became pertinent to recall PW6 being Forensic expert. As such, no error apparent can be said to have been committed by the trial court in passing the impugned order dated 02.04.2019.

(38) Dismissed with no order as to costs.

11.08.2023

V.Vishal

- 1. Whether speaking/reasoned?*
- 2. Whether reportable?*

(Sandeep Moudgil)
Judge

Yes/No
Yes/No