

[CRM-M-23942-2022](#)

Date of decision: 21.02.2023

Ghanshayam Singh

.....Petitioner

versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR**Present:** Mr. G.S.Virk, Advocate
for the petitioner.

Mr. Adhiraj Singh, AAG, Punjab.

NAMIT KUMAR, J. (ORAL)

The challenge in the present petition is to the order dated 23.02.2022 (Annexure P-4) vide which the application filed by the petitioner under Section 311 of Cr.P.C. in a case bearing FIR No.24 dated 18.02.2016 under Sections 452/307/323/506/148/149 of IPC (Section 307 deleted later on) registered at Police Station Daba, Ludhiana (Annexure P-1) seeking permission to recall witnesses PW-3 Bhan Singh and PW-4 Ramandeep Singh for further cross examination has been dismissed.

The brief necessary facts for the disposal of the present case are that PW-3-Bhan Singh was partly examined in chief on 16.04.2018 and further examination-in-chief was done on 30.05.2018 and 11.06.2018. He was partly cross-examined on 11.06.2018 and his cross-examination was deferred due to the fact that the Court time was over. Similarly, PW-4-Ramandeep Singh was examined-in-chief on 30.05.2018 and his cross-examination was deferred due to non-availability of counsel for the accused. Thereafter, on 05.07.2018; the case was fixed for cross examination of both these witnesses. They were present for cross-examination but as counsel for the accused/petitioner was not available, cross examination of both these PWs was declared as Nil. Thereafter, an application dated 17.01.2022 (Annexure P-2) under Section 311 of Cr.P.C. was filed on behalf of Sanjay Kumar, Dalip Pandey, Ghanshayam Singh and Vikramjeet Singh for permission to recall the above said two witnesses for further cross-examination to which detailed reply dated 03.01.2022 (Annexure P-3) was filed and the said application has been dismissed vide impugned order

dated 23.02.2022 (Annexure P-4) by the Court of learned JMIC, Ludhiana, by holding that opportunity to cross-examine PW-3 and PW-4 was treated as Nil after giving ample opportunities to the accused and, thereafter, the Court cannot recall its own order and the remedy if any, available with the accused is by way of filing revision/appeal against the said order.

Learned counsel for the petitioner contends that examination of chief of both the witnesses was completed and their cross examination was deferred due to non-availability of counsel for the accused and on 05.07.2018; both the said witnesses were present before the Court and since, counsel for the accused was busy in other Court, the said witnesses could not be cross-examined and were treated Nil by the trial Court. He further seeks one opportunity for completing the cross examination of PW-3 Bhan Singh and PW-4 Ramandeep Singh.

The learned State counsel has opposed the present petition and has submitted that the impugned order dated 23.02.2022 (Annexure P-4) passed by the trial Court is perfectly legal and valid and does not require any interference by this Court.

I have heard learned counsel for the parties and perused the records.

Before considering the submissions of learned counsel for the petitioner, it would be apposite to extract Section 311 Cr.P.C., which is reproduced as below:-

“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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case.”

It is apparent from the above quoted provision that the Court is vested with a broad and wholesome power to summon and examine or recall and re-examine any material witness at any stage, if his/her evidence appears to be essential to the Court for the just decision of the case.

The nature and extent of the power vested in the Courts under Section 311 Criminal Procedure Code to recall witnesses was examined by the Hon'ble Apex Court in 'Hanuman Ram v. The State of Rajasthan &Ors.',

2008(4) RCR (Criminal) 823, wherein it was held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. The Hon'ble Apex Court had observed as under:-

‘This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts. 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, enquires 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 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.’

In recent judgment rendered by the Hon'ble Apex Court in Criminal Appeal No.1021 of 2022 titled as ‘Varsha Garg Vs. State of Madhya Pradesh and others’ (decided on dated 08.08.2022), wherein the following observation has been made in paragraphs No.31 and 32 thereof:-

“31. Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P. (1978) 2 SCC 518**, **State of W.B. v. Tulsidas Mundhra (1963) Supp 1 SCR 1**, **Jamatraj Kewalji Govani v. State of Maharashtra (1967) 3 SCR 415**, **Masalti v. State of U.P. (1964) 8 SCR 133**, **Rajeswar Prosad Misra v. State of W.B. (1966) 1 SCR 178** and **R.B. Mithani v. State of Maharashtra (1971) 1 SCC 523**, the Court held:

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe

guides and that only the requirements of justice command the examination of any person which would depend on the fact and circumstances of each case.”

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

From the above discussion, it is manifest that the power under Section 311 Cr.P.C. can be exercised at any stage of the proceedings for the just decision of the case.

In *Rajendra Prasad v. Narcotic Cell, Delhi, 1999(3) R.C.R. (Criminal) 440*, the Hon'ble Apex Court held as under:

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to error in human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.”

Since the object is to do complete justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.

It has been held by the Hon'ble Supreme Court in *Sarabjit Rick Singh Vs. Union of India (2008) 2 SCC 417* as under:-

‘24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereof. If an exception is to be carved out, the statute

must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking evidence viz-a-viz, opinion.'

The said judgment has been followed in 'Jayendra Vishnu Thakur Vs. State of Maharashtra and another' reported as 2009(7) SCC 104. Further, no prejudice would be caused to the respondent if PW-3-Bhan Singh and PW-4-Ramandeep Singh, are cross-examined. No other point has been urged.

In view of the aforementioned facts and circumstances and also the settled principles of law, the present petition is allowed and order dated 23.02.2022 passed by the Court of learned JMIC, Ludhiana, is set aside and trial Court is directed to grant one opportunity to the petitioner to cross-examine PW-3-Bhan Singh and PW-4-Ramandeep Singh. Parties to appear before the trial Court on 09.03.2023.

The present petition is disposed off accordingly.

21.02.2023
Neha

(NAMIT KUMAR)
JUDGE

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