

In the High Court for the States of Punjab and Haryana at
Chandigarh

CRR-834-2021

Reserved on: *February 16, 2023*

Date of Decision: *February 21, 2023*

State of Haryana

... Petitioner

Versus

Vinod Kumar and another

... Respondents

CORAM: **HON'BLE MR. JUSTICE VIVEK PURI**

Present: Mr. Ranvir Singh Arya, Addl. A.G., Haryana.

Mr. Arvind Bansal, Advocate,
for respondent No.1.

None for respondent no.2

Vivek Puri, J.

The petitioner has assailed the order dated 24.03.2021 passed by the learned trial Court vide which application under Section 311 of the Code of Criminal Procedure (for short 'the Code') filed by the prosecution, has been dismissed.

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

Learned State counsel contends that the respondents no.1 and 2 are facing trial for having committed the offence punishable under Section 21 of the Narcotic

Drugs and Psychotropic Substances Act (for short 'NDPS Act') as 80 grams and 60 grams of smacks respectively, have been recovered from their conscious possession. The prosecution evidence has been concluded, but inadvertently, the name of two witnesses i.e. MHC Ashok Kumar and EHC Jarnail could not be mentioned in the list of witnesses. The case property was retained in the malkhana by MHC Ashok Kumar and EHC Jarnail had carried the sample parcel to the laboratory for chemical examination. The examination of both the witnesses is essential for the just decision of the case. It is not case that the witnesses have been introduced subsequently. The aforesaid witnesses are required to be examined to complete the link evidence.

The learned counsel for the respondent no.1 has contended that the prosecution evidence has been concluded and the case was fixed in the trial Court for recording statement of the respondents under Section 313 of the Code. The prosecution has examined 06 witnesses and 03 witnesses were given up after exhausting the list of witnesses. The public prosecutor has closed the prosecution evidence. By moving the present application, an attempt is being made by the prosecution to fill up the lacuna in its case which is not permissible under law. Moreover, the statements of the proposed witnesses under Section 161 of the Code have not been recorded. In the event, the

permission is granted to lead additional evidence, it will amount to fill up the lacuna in the case of the prosecution. Learned counsel for the respondent no.1 has sought to place reliance upon ***Harnam Singh vs. M/s Bhushan Metallica Ltd., 2007(1) R.C.R. (Criminal) 992*** and ***Sukhpal Singh vs. Baljit Singh, 2020(2) R.C.R. (Criminal) 344*** to argue that no justified ground is made out to permit the prosecution to examine the aforesaid two witnesses.

The permission to lead additional evidence in the trial Court has to be granted on the touch stone of the provisions of Section 311 of the Code, which 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.”

The recourse to Section 311 of the Code is to be resorted only with an object of finding out the truth and procuring the proof of fact which may lead to just and correct decision of the case. Section 311 of the Code enables

the Court with the power to summon, recall and re-examine any witness, who has already been examined. This section confers a wide discretion on the Court to act as the exigencies of justice and the circumstances of the case may require. The Court can summon any witness, if the examination of such witness appears to be essential for the just decision of the case. However, it has also to be borne in mind that such power cannot be exercised to permit any of the parties to fill up lacuna in its case. There must be sufficient and reasonable material to justify for exercise of the discretionary power vested in the Court.

The learned trial Court had primarily dismissed the application on the score that the proposed witnesses were never joined during investigation and their statements under Section 161 of the Code were not recorded. Furthermore, it has been observed that the prosecution kept on sleeping over the matter after recording of the statements of the 06 witnesses and the evidence was closed by the public prosecutor.

It shall not be appropriate to decline the summoning of the witness merely on the score that the statement of the witness under Section 161 of the Code has not been recorded. The effect thereof, if any, is to be seen at the appropriate stage of the trial. In ***Dayal Singh vs. State of Maharashtra, 2007(2) R.C.R. (Criminal) 909***, it has

been held that the failure to comply with the requirements of Section 161(3) of the Code might affect the weight to be attached to the evidence of the witnesses, but it will not render it inadmissible. Furthermore, merely because the prosecution evidence has been closed cannot be termed to be a circumstance to decline the summoning of the witnesses. Section 311 of the Code is amply clear to the effect that the power can be exercised at any stage of the proceedings.

Before proceeding further, it may be mentioned here that the judgments relied upon by the learned counsel for the respondent are distinguishable from the facts of the present case. In **Harnam Singh's** case (supra), the application for additional evidence was moved before the appellate Court and that too after 20 hearings had taken place in the appeal. Furthermore, it was the third application filed by the prosecution. In **Sukhpal Singh's** case (supra), the application for additional evidence was moved after the arguments were addressed in the trial Court. Furthermore, in the said case, an attempt was being made to prove the certificate depicting the date of dishonor of the cheque in the proceedings under Section 138 of the Negotiable Instruments Act. It was concluded that in the complaint, as well as, legal notice, there was no mention of any memo and it was also appearing on record that the

memo was available with the complainant when the legal notice was issued. The proposed evidence was with an attempt to defeat the legal defence taken by the petitioner to the effect that the legal notice has been issued after the expiry of the statutory period.

On advertng to the merits of the present case, MHC Ashok Kumar has retained the case property in the malkhana and EHC Jarnail had carried the sample parcel to the office of Forensic Science Laboratory. The witnesses are sought to be examined to complete the link evidence and rule out the possibility of tampering with the case property and the sample parcels while the same were retained in the malkhana and during the course of transit of the sample parcel to the office of Chemical Examiner. The proposed evidence appears to be essential for the just decision of the case and it cannot be said that an attempt is being made to fill up the lacuna of the prosecution evidence.

On finding sufficient merit in the case, present petition is allowed, the impugned order is set aside and the learned trial Court is directed to afford reasonable opportunity to the prosecution to examine the aforesaid two witnesses.

February 21, 2023
vk

(Vivek Puri)
Judge

Whether speaking/reasoned :	Yes
Whether reportable :	Yes