

CRR-2339-2018 (O & M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRR-2339-2018 (O& M)
Date of Decision:24.03.2023

Phool Singh

... Petitioner

Versus

State of Haryana and anr.

...Respondents

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Pankaj Mehta, Advocate for the petitioner.

Mr. Kanwar Sanjiv Kumar, AAG, Haryana.

Mr. Ravinder Rana, Advocate,
for Mr. Vivek Khatri, Advocate, for respondent No.2.

JASJIT SINGH BEDI, J.

The present revision petition has been preferred against the order dated 28.05.2018 passed by the Additional Sessions Judge, Hisar, whereby an application filed by the complainant under Section 311 Cr.P.C. has been allowed.

2. The brief facts of the case are that an FIR No.163 dated 23.02.2017 under Sections 297, 447 IPC and Section 3(1) of the SC & ST Act at Police Station Sadar, Hisar, came to be registered at the instance of Sheo Chand and other persons of the Scheduled Caste community with the allegations of trespass into the cremation ground of village Mangali Jhara where dead bodies of the children of the community were buried and for removal of the same.

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3. Pursuant to the registration of the FIR, the report under Section 173(2) Cr.P.C. was submitted and the Trial begun.

4. During the course of the Trial, an application dated 21.02.2018 came to be moved by the Public Prosecutor for examining the witnesses mentioned in the application alongwith the production of certain documents. A copy of the application dated 21.02.2018 is attached as Annexure P-1 to the present petition.

The accused-petitioner filed his response to the said application. It was his contention that the application had been moved to fill up the lacuna so that his defence could be sabotaged. A copy of the reply of the accused-petitioner is attached as Annexure P-2.

5. After considering the matter, the Court of Additional Sessions Judge, Hisar allowed the application vide order dated 28.05.2018 which is impugned in the instant petition.

6. The learned counsel for the petitioner/accused contends that the police thoroughly investigated the matter and pursuant thereto a challan came to be filed. The present application has been moved at a belated stage and only to fill up the lacuna which would cause prejudice to the accused. The Trial Court while allowing the application has not recorded a satisfaction that it was essential to bring on record the documents sought to be produced for the just adjudication of the case. Therefore, the order was liable to be set aside.

7. The learned counsel for the respondent No.2-complainant Sheo Chand, on the other hand, contends that the order had been rightly passed.

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The documents and the evidence sought to be produced were essential for the just adjudication of the case. The question of filling up of the lacuna would remain a subsidiary issue to the essentiality of the evidence which is primary issue. In the instant case, the evidence sought to be produced by way of an application under Section 311 Cr.P.C. was certainly essential for the just adjudication of the case.

8. The learned counsel for the State has also stated that the impugned order dated 28.05.2018 had been rightly passed. The evidence sought to be produced was essential for the just adjudication of the case in terms of Section 311 Cr.P.C.

9. I have heard the learned counsel for the parties at length.

10. Before proceeding further, it would be apposite to examine Section 311 Cr.P.C., 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.”

11. The Hon’ble Supreme Court has dealt with the issue in hand in a number of cases.

In **Varsha Garg Versus The State of Madhya Pradesh & others, Criminal Appeal No. 1021 of 2022. Decided on 08.08.2022**, it was held as under:-

“29. The first part of the statutory provision which uses the expression “may” postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. 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 reexamine 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 the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30. A two judge Bench of this Court in Mohanlal Shamji Soni (*supra*) while dealing with *pari materia* provisions of Section 540 of the Criminal Code of Procedure 1898 observed:

“16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.”

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its

exercise. It is only circumscribed by the principle that the “evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means.” In that context the Court observed:

“18 ...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

31. Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra, 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 facts 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.

38. Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution’s case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.

39. In the decision in Zahira Habibullah Sheikh (5) v. State of Gujarat, which was more recently reiterated in Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 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 noted that:

“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.*

(emphasis supplied)

40. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in Mina Lalita Baruwa (supra), while reiterating Rajendra Prasad (supra), the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In Rajendra Prasad (supra), the Court had held that:

*“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.”*

(emphasis supplied)

In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.

41. Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on Swapan Kumar (supra), a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in Swapan Kumar (supra) observed:

“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.”

In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of the decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court.

42. The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, 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. This Court in Zahira Habibulla H. Sheikh (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:

“43. The 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. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. 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 courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.”

(emphasis supplied)

Further, in Zahira Habibullah Sheikh (5) (supra), the Court reiterated the extent of powers under Section 311 and held that:

*“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.”

43. The Court while reiterating the principle enunciated in *Mohanlal Shamji Soni (supra)* stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

*“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 judiciously 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 subserve 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.

While reiterating the decisions of this Court in Karnel Singh v. State of M.P., Paras Yadav v. State of Bihar, Ram Bihari Yadav v. State of Bihar and Amar Singh v. Balwinder Singh this Court held that the court may interfere even at the stage of appeal:

“64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so-called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals.”

44. For the above reasons, we have come to the conclusion that the decision of the High Court which is impugned in the

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appeal is unsustainable. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 8 April 2022 in Misc. Criminal Case No. 57152 of 2021 as well as the order of the Second Additional Session Judge, Dr. Ambedkar Nagar, District Indore dated 13 November 2021 in Sessions Trial 227 of 2016 dismissing the application filed by the prosecution. The application filed by the prosecution for the production of the decoding registers and for the summoning of the witnesses of the cellular companies for that purpose is allowed. The Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore is directed to conclude Sessions Trial No. 227 of 2016 by 31 October 2022.

(emphasis supplied)

In the case of **Rajaram Prasad Yadav Versus State of Bihar,**

2013(3) R.C.R. (Criminal) 726, it was held as under:-

23. From a conspectus consideration of the above decisions, while dealing with an application under Section [311](#) Criminal Procedure Code read along with Section [138](#) of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

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](#) Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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](#) Criminal Procedure Code 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.

[emphasis supplied]

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12. This Court in the case of **'Pardeep Singh and another versus State of Haryana and another(CRM-M-47153-2018 decided on 19.10.2022)'**, held as under:-

"11. A perusal of Section 311 Cr.P.C. along with the judgments would establish that if allowing of an application under Section 311 Cr.P.C. amounts to filling up of a lacuna then that by itself would be a subsidiary factor and the Courts determination of the application should be based only on the test of 'essentiality of the evidence'. On the other hand, so far as the judgments cited by the learned counsel for the petitioners are concerned, they do not further the case of the petitioners in the facts and circumstances of the present case.

12. Coming back to the facts of the present case, it may be pointed out that after the statement of the accused were recorded under Section 313 Cr.P.C. on 22.01.2018, the statement of Pardeep Singh-petitioner No.1 (accused) was recorded as DW-5 in the civil proceedings emanating out of the same transaction. It was in that situation that an application under Section 311 Cr.P.C. was moved to produce the certified copy of the testimony of Pardeep Singh (petitioner No.1) by way of additional evidence in the present complaint. The question of Pardeep Singh being confronted with the said statement would not arise as in the present case Pardeep Singh was not examined as a witness but in fact was an accused. Even otherwise, the parties have a right to prove their case in the manner that they think fit and what evidence is sought to be produced cannot be disputed by either party. Of course, the evidentiary value of the additional evidence sought to be brought on record would be a subject matter of appreciation during the course of Trial. Further, the stage of moving of an application under Section 311 Cr.P.C. or the same amounting to the filling up of a lacuna would be subservient to

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the larger context of the 'essentiality of evidence' sought to be produced. In the the present case, the accused/petitioners would certainly have the right to clarify their position with respect to the statements/deposition sought to be produced in terms of Section 313 Cr.P.C. as has been rightly pointed out by the Trial Court and therefore it cannot be said that the exercise of powers by the Trial Court had resulted in causing serious prejudice to the accused resulting in miscarriage of justice”.

13. A perusal of Section 311 Cr.P.C. along with the judgments (supra) would clearly establish that if allowing of an application under Section 311 Cr.P.C. amounts to the filling up of a lacuna, then that fact in itself is a subsidiary factor and the Court's determination of the application should be based only on the test of the essentiality of the evidence. While, it is true that the right of the accused to a fair trial is constitutionally protected under Article 21 of the Constitution of the India, it is the duty of the Court to allow the prosecution/complainant or for that matter the accused to rectify an error/oversight in the interest of justice. The prosecution and the defence must be permitted to lead evidence of the kind and in the manner that it deems appropriate in the facts and circumstances of a particular case and the Court should ordinarily not curtail the same unless the Court finds that the evidence sought to be produced is completely irrelevant to the controversy in hand.

14. In the present case, the allegations are of the accused-petitioner trespassing into the cremation ground in the use of the Scheduled Caste community. It is also alleged that the dead bodies of the buried children were removed. For the said purpose, it is essential to produce the Scheduled Caste

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Certificates of the various witnesses/complainants as is mentioned in Para 3 of the application (Annexure P-1) alongwith the revenue record to substantiate the fact that the land in question is in fact, a cremation ground. Similarly, the Tehsildar is required to be examined alongwith the complete record of the Scheduled Castes Certificates which are sought to be produced as per Para 3 of the aforesaid application. In addition, it is necessary to bring the record regarding the notice under Section 24(2) of the Haryana Panchayati Raj Act, 1994 which pertains to the power to require removal of encroachment and nuisance as it is the case of the complainant that this notice had been issued to the petitioner-accused. It may also be pointed out that if allowing of an application under Section 311 Cr.P.C. amounts to the filling up of a lacuna, then that fact would remain subsidiary to the larger issue of the essentiality of the evidence and the fairness of the Trial to all stages. In fact, if the evidence sought to be produced by way of an application under Section 311 Cr.P.C. came on record, no irreparable loss would be caused to the accused-petitioner as he would have ample opportunity to cross-examine the relevant witnesses on all issues.

15. In view of the aforementioned discussion, I find no merit in the present petition and the same is dismissed.

(JASJIT SINGH BEDI)
JUDGE

March 24, 2023
sukhpreet

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No

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