

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

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

CRM-M-43879 of 2022
Reserved on: 21.03.2023
Pronounced on: 27.03.2023

Saravjeet Singh @ Sarbjeet Singh

.....Petitioner

vs.

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Argued by: Mr. Abhishek Sharma, Advocate, for the petitioner.
Mr. Zorawar Singh Chauhan, DAG, Haryana.

NAMIT KUMAR, J.

The instant petition has been filed by the petitioner under Section 482 Cr.P.C. for quashing of impugned order dated 13.10.2021 (Annexure P-1) passed by the Court of learned Judicial Magistrate Ist Class, Panchkula, whereby application moved by the petitioner-accused under Section 311 Cr.P.C. to recall PW1 for cross-examination has been dismissed during the trial of the case titled as 'State v. Sarvjeet Singh; arising out of FIR No.306 dated 24.07.2019 under Sections 279 and 338 IPC, registered at Police Station Sector 5, Panchkula, and order dated 29.04.2022 (Annexure P-2) passed by the Court of learned Sessions Judge, Panchkula, whereby revision petition filed by the petitioner against the order dated 13.10.2021, has been dismissed.

Briefly stated, petitioner-Saravjeet Singh was charge-sheeted under Sections 279 and 338 of IPC on 12.02.2020, to which he

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

pleaded not guilty and claimed trial. On 02.04.2021, case was fixed for prosecution evidence. PW Nitin Dayal was present. It was noticed by the Court that the District Bar Association, Panchkula had circulated a notice to suspend the work on that day. In place of main defence counsel, Shri Ankit Malik, Advocate appeared as proxy for him; and statement of Nitin Dayal was recorded as PW1, who was cross-examined by Sh. Ankit Malik, Advocate as proxy counsel.

Learned counsel for the petitioner contends that application under Section 311 Cr.P.C. filed by the petitioner for recalling PW1 Nitin Dayal for his cross-examination has wrongly been dismissed by Courts below and petitioner has been deprived of the opportunity to cross-examine the witness. He further submits that due to strike call given by the Bar Association, his main defence counsel did not appear and proxy counsel, namely, Ankit Malik, Advocate, who conducted cross-examination of PW1-Nitin Dayal had not filed his vakalatnama and even he was not known to the defence counsel. Therefore, in the interest of justice, impugned orders are liable to be set aside and petitioner may be granted opportunity to cross-examine PW1 Nitin Dayal.

Per contra, learned State counsel opposed the prayer made by learned counsel for the petitioner and submitted that the impugned orders passed by the Courts below are fully justified as there is no substance in the prayer made by the petitioner.

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

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

On 22.09.2022, this Court had issued notice of motion in the present case but no reply has been filed by the State although it has been strongly opposed.

Section 311 Cr.P.C. 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.”

A bare perusal of this Section shows that power conferred under Section 311 Cr.P.C. is wide enough and any witness can be recalled and re-examined who has already been examined 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

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

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

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

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

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

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.”

Perusal of order dated 13.10.2021 passed by the Court of learned Judicial Magistrate Ist Class, Panchkula, shows that due to strike call given by the District Bar Association, Panchkula, lawyers

CRM-M-43879 of 2022 (O&M)

2023:PHHC:044573

had suspended work on 02.04.2021. PW1-Nitin Dayal was cross-examined by proxy counsel, namely, Ankit Malik, appointed by the Bar instead of main defence counsel, who was not known to the petitioner and was not aware about the facts of the case and had appeared without filing his power of attorney. The trial Court has also recorded a wrong finding in the order dated 13.10.2021 that sufficient opportunity was given to the counsel for the petitioner-accused to cross-examine the witness.

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.

In view of the above, impugned order dated 13.10.2021 passed by the Court of learned Judicial Magistrate Ist Class, Panchkula, and order dated 29.04.2022 passed by the Court of learned Sessions Judge, Panchkula, are set aside. The application moved by the petitioner-accused under Section 311 Cr.P.C. for recalling the PW1-Nitin Dayal for cross-examination is allowed.

With the abovesaid observations, petition is accordingly, disposed of.

27.03.2023
R.S.

(NAMIT KUMAR)
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No