

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

CRR-1950-2023

Date of Decision: September 01, 2023

Shiv Kumar

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE VIVEK PURI

Present: Ms. Jigyasa Tanwar, Advocate,
for the petitioner.

Mr. Surinder Kumar Dagar, DAG, Haryana.

Vivek Puri, J.

1. The petitioner has assailed the order dated 08.08.2023 passed by the Court of learned Special Court, Kaithal, vide which the application submitted by the petitioner under Section 311 of the Code of Criminal Procedure (for short 'Code') in the case bearing FIR No. 232, dated 21.06.2020, under Sections 302 and 304-B of the Indian Penal Code (for short 'IPC'), registered at Police Station Pundri, District Kaithal, has been dismissed.

2. The petitioner is facing trial for having committed the offence punishable under Sections 302 and 304-B IPC. The petitioner had submitted an application under Section 311 of the Code for recall of Manoj Kumar PW1 for further cross examination. It has been alleged that the witness was

cross-examined by the defence counsel. Subsequently, the petitioner came to know that several material questions could not be put to the witness which are material and necessary for the just and proper adjudication of the case. Accordingly, the recall of the witness has been sought.

3. Learned counsel for the petitioner contends that when the complainant i.e. Manoj Kumar, PW1, was examined, the petitioner was represented by another counsel. Subsequently with the change of counsel, it emerged that the relevant and the important questions have not been put to the witness during his cross-examination. The witness could not be put questions with regard to the divorce from the first husband of the deceased, sending the brother of Manoj Kumar, PW1, to abroad, expenditure and other expenses on the marriage, health of the deceased as she was suffering from neuro ailments and the children of the deceased.

4. Section 311 of the Code enables the Court with the power to summon, recall and re-examine any witness, who has already been examined. The section confers a wide discretion on the Court to act as the exigencies of justice and the circumstances of the case may require. The power to recall a witness is wide and could be exercised at any stage, but the same cannot be exercised mechanically, without just and adequate reasons. At the end of the trial, exercise of

such power is permissible only in exceptional situation. The Court can recall a witness in the event, the further examination of the 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. Even the mistake or lapse on the part of the defence counsel without any significant and substantial material cannot be termed to be circumstance to justify the recall of witness in each and every case.

5. In **AG vs. Shiv Kumar Yadav and another, 2015(4) R.C.R. (Criminal) 312**, the recall of the witness on the ground that there is a change of counsel has been disapproved and it has been observed as following:-

“(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

6. On a query, the learned counsel for the petitioner submits that the statement of Manoj Kumar, PW1, was recorded on 04.04.2022. The prosecution evidence has been concluded in the trial Court and the case is fixed for defence evidence. Furthermore, the other relatives of the deceased have not supported the prosecution version.

7. It is significant to note that the case in the trial Court is at the stage of defence evidence. It appears that some of the witnesses that have not supported the prosecution version and an attempt is being made by the petitioner to seek recall of Manoj Kumar, PW1. Manoj Kumar, PW1, had appeared in the witness box on 04.04.2022 and was cross-examined by the counsel engaged by the petitioner. The impugned order indicates that the cross-examination was running in 4 pages and after the examination of this prime witness, 10 other witnesses have been examined and 5 witnesses have been given up by the prosecution. The application under Section 311 of the Code was moved on 03.08.2023 by the petitioner. Although, the power under Section 311 of the Code can be exercised at any stage of the trial, but there is nothing to indicate that as to what prevented the petitioner from moving the application at the earlier instance. The prosecution evidence has already been closed and the case in the trial Court is fixed for defence evidence.

8. The petitioner is seeking recall of the witness on the score that the earlier counsel engaged by the petitioner has not effectively cross-examined the witness on all the material aspects of the case. It is not the case of the petitioner that any other witness were also not effectively cross-examined and recall of no other witness has been sought. Significantly, the change of counsel in the instant case cannot be permitted to be a circumstance to recall the witness particularly because full opportunity was afforded for the effective cross-examination of the witness. If recall of the witness on such ground is permitted, it can result in repeated recall of the witness with the subsequent change of counsel.

9. In these set of circumstances, no illegality or irregularity is made out in the impugned order, which may warrant interference by this Court.

10. Instant petition is dismissed accordingly.

September 01, 2023
vkd

(Vivek Puri)
Judge

Whether reasoned/speaking: Yes
Whether reportable : Yes