

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

CRM-M-47839-2023(O&M)

Date of decision : 04.10.2023

Sukhpreet Singh Dhaliwal

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Mandeep Kaushik, Advocate for the petitioner

Mr.Jagdish Manchanda, Addl.AG, Haryana

AMAN CHAUDHARY, J.

1. The present petition under Section 482 of the Code of Criminal Procedure has been filed for setting aside the order dated 13.09.2023 passed by learned Sessions Judge, Panchkula, whereby the application under Section 311 CrPC filed by the petitioner for recalling PW-1 for cross-examination, was dismissed.

2. Learned counsel contends that the trial Court has committed a grave error while declining the application of the petitioner merely on the ground that the same is an attempt to delay the trial. The accused-petitioner, who was appearing through video conferencing did not even come to know when the Court recorded his no objection to adopt the cross-examination conducted on behalf of the other co-accused, as he had not made such statement, as is also stated in para 6 of the petition. Due to absence of his counsel, the petitioner should not be penalised. He is an illiterate person and thus, he does not know the intricacies of law. It is only on having later realised the consequences of non-grant of

opportunity to cross-examine the complainant, which is very much essential for his defence, the application was filed. Further that the right of the petitioner cannot be taken away, merely, that this Court has granted three months' time to conclude the case. The trial Court had also allowed an application filed by the prosecution under Section 311 CrPC on 29.08.2023, as such, one opportunity could in all fairness be granted to the petitioner as well, which is being sought, even if the same is subject to costs and he has no objection if it is done through video conferencing mode, in view of the apprehension expressed by the trial Court. Reliance is placed on **Veena vs. State of Punjab**, CRM-M-28916-2003, decided on 08.07.2003 to contend that the petitioner should not suffer on account of the fault of the counsel.

3. On receipt of advance notice, Mr.Jagdish Manchanda, Additional Advocate General, Haryana puts in appearance and opposes the petitioner on the ground that the trial Court has rightly dismissed the application, it being filed at a belated stage and to delay the proceedings.

4. Heard the learned counsel on either side.

5. It is apposite to make a reference to Section 311 CrPC, which reads thus:

“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.”

6. Bare reading of the aforesaid provision *expressis verbis* reveals that the power under this Section can be exercised by any Court at any stage of the proceedings and equally if not more important is the usage of word 'shall' in the

second part, that makes it imperative that the Court has to summon and examine all persons whose evidence appears to be essential to the just decision of the case. The said power is not granted with the purpose filling up the lacunae in the evidence of prosecution or defence, rather is to discover the relevant facts or to obtain proper proof of such facts for arriving at a just decision of the case. The sole factor to be contemplated by the Court should be to see that justice is done. It is ultimately with the Court of facts to place reliance on the testimony of witness which would be based on the quality of their evidence, the truthfulness in it and confidence that it inspires.

7. Pertinently, insofar as the statement of the petitioner to adopt the cross-examination done by the counsel for other co-accused is concerned, the same was apparently made for the reason of non-availability of his counsel. The concept of cross-examination is the most essential ingredient of fair trial. It is well settled that the rights of the accused to prove his innocence are valuable and cannot be defeated. The denial whereof can gravely prejudice his defence. By far, it is settled that the petitioner cannot be made to suffer for the fault of his counsel. Hon'ble The Supreme Court in the case of **Rafiq vs. Munshilal and another**, AIR 1981 SC 1400, held that, "What is the fault of the party who having done everything in his power expected of him, would because of his advocate ... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent... We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted." Reiterating the aforesaid view, in **Shaikh Mukthar and another vs. State of Andhra Pradesh**, (2020) 19 SCC 178, it was observed that the appellants should not have been penalised for the absence of their advocate on the date of hearing.

8. Yet another notable aspect being that the trial Court had granted an opportunity to the prosecution under Section 311 CrPC on 29.08.2023 itself, but presuming the filling of an application by the accused, to be a tool for delaying the proceedings, entailing dismissal seems to be too far fetched, it also being without any basis. In a similar vein, the direction issued to conclude trial cannot also be brought in as a valid ground, that too at the cost of defeating the right of an accused to cross-examine a vital witness, such as the complainant.

9. As regards, the threat perception to the complainant is concerned, the same can well be warded off by allowing his cross-examination to be conducted through video conferencing, as had been the observations of Hon'ble The Supreme Court in **State of Maharashtra vs. Praful B. Desai (Dr)**, (2003) 4 SCC 601, wherein it was observed and held that, "Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place...Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence... In fact he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other... Recording of such evidence would be as per "procedure established by law"."

10. The Court with regard to the evidence being recorded or its cross-examination cannot infuse its presumptions into it. The efforts at all times in the trial must be towards giving complete opportunity to both sides, so that the truth can be unearthed.

11. A gainful reference can be made to **Rajaram Prasad Yadav vs. State of Bihar**, (2013) 14 SCC 461, wherein Hon'ble The Supreme Court while

elucidating the scope and ambit of Section 311 CrPC observed and held thus:-

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1 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?

17.2 The exercise of the widest discretionary power under Section 311 Cr.P.C. 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.

17.3 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.

17.4 The exercise of power under Section 311 Cr.P.C. 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.

17.5 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.

17.6 The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7 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.

17.8 The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9 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.

17.10 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.

17.11 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.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 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.

17.4 The power under Section 311 Cr.P.C. 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.”

12. Illuminating further the scope of Section 311 CrPC, Hon’ble The Supreme Court in the case of **Iddar vs. Aabida**, (2007) 11 SCC 211, observed that, “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...”

13. It is the duty of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. Counsel for each accused would have his own perspective to cross-examine a particular witness, that would be peculiar to the allegations qua his client, thus adopting the cross-examination of the complainant that had been conducted on behalf of other co-accused, as the counsel for the petitioner was unavailable, cannot in every case suffice. Dismissal of the application observing it to be belated and to derail the trial, without taking into consideration the object underlying Section 311 of the Code being that there may not be failure of justice as held by Hon’ble The Supreme Court in **Godrej Pacific Tech. Limited vs. Computer Joint India Limited**, (2008) 11 SCC 108 and that denial of an opportunity to cross-examine, would result in the petitioner suffering a penalty totally disproportionate to the gravity of the mistake.

14. Hon’ble The Supreme Court in **Varsha Garg vs. State of M.P.**, 2022 SCC OnLine SC 986, while considering and allowing the application under Section 311 CrPC observed that, “...The statutory provision goes to emphasize 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.”

15. Fairness of trial being a virtue that is sacrosanct in the judicial system, the dismissal of the application of the petitioner would amount to denial of a fair opportunity to him to defend himself. There is even a duty cast upon the Court to arrive at the truth, one of the means for which is the proper and complete examination of the witnesses.

16. The facts of the present case when considered in juxtaposition to the judicial pronouncements, has led this Court to a conclusion that the impugned order is liable to be set aside. Accordingly, the present petition is allowed, subject to costs of Rs.25,000/- to be deposited with the trial Court, which will be disbursed to the complainant. The accused-petitioner is granted only one effective opportunity to cross-examine PW1-Parteek through video conferencing. The requisite fee for recalling the said witness will be borne by the petitioner himself.

17. Nothing herein shall be treated as an expression on the merits of the case and the trial Court shall proceed and decide the matter, independent of any observation made in the present judgment, which was only for the purpose of adjudicating the instant petition.

18. Pending application(s), if any, shall also stand disposed of accordingly.

04.10.2023
gsv

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No