

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-1884-2024 (O&M)

Date of decision:21.02.2024

Karamjit Singh ...Petitioner
V/s
State of Punjab and anotherRespondents

CORAM: HON’BLE MR. JUSTICE SUMEET GOEL

Present: Mr. H.S. Sandhu, Advocate for the petitioner.
Mr. Adhiraj Singh Thind, AAG Punjab.
Mr. Vikas Gupta, Advocate for respondent No.2.

SUMEET GOEL, J.

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 for quashing of order dated 06.12.2023 passed by learned Judicial Magistrate Ist Class, Patti whereby the application filed by the petitioner (herein)-accused, under Section 311 of Cr.P.C. of 1973 for recalling of the witness-Sukhraj Kaur (respondent No.2 herein) for her cross-examination, was dismissed.
2. Learned counsel for the petitioner has argued that the said witness namely Sukhraj Kaur, is a prime witness of the prosecution, being complainant in the FIR in question i.e. FIR No.53 dated 29.10.2015 registered under Sections 406/498-A/120-B IPC at Police Station Khalra in District Tarn Taran, and, therefore, her cross-examination by the petitioner (herein)-accused is pertinent for the defence-side. Learned counsel has further argued that the cross-examination of the said witness being treated as ‘Nil’ is against the basic tenets of law and hence the learned trial Court ought to have allowed the said application.

3. Learned State counsel as also learned counsel for the complainant-respondent No.2 have opposed the instant petition by arguing that sufficient opportunity(s) was provided to the accused for conducting cross-examination of the said witness & the same was adjourned at the instance of the accused as the accused wanted to delay the culmination of trial. It has been further argued that no plausible explanation has been furnished in the said application for recalling the said witness for cross-examination. Therefore, dismissal of the instant petition is prayed for.

4. I have heard learned counsel for the rival parties and perused the paper-book.

5. The prime issue for determination in the present case is as to whether, the application under Section 311 of Cr.P.C. filed by the petitioner-accused (hereinafter referred to as 'application in question'), ought to have been allowed for recalling the complainant/witness-Sukhraj Kaur for cross-examination. The analogous legal issue that arises for consideration in the present petition is as to what are the parameters for consideration of an application under Section 311 of Cr.P.C., 1973.

Relevant Statute

6. Section 165 of the Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act') reads as under:

“165. Judge’s power to put questions or order production. — The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

Section 311 of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as Cr.P.C.) stipulates 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.”

Relevant Case Law

7. The precedents, *apropos* to the matter(s) in issue, are as follows:

I Re: section 311 of Cr.P.C.

(i) The Hon'ble Supreme Court in a judgment titled as ***Zahira Habibullah Sheikh & anr. Vs. State of Gujarat & Ors. 2006(2) R.C.R. (Criminal) 448***, has held as under:-

25. xxxx xxxx xxxx xxxx

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the

other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of 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.

26. 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 for 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 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 conferred is to be exercised Judiciously, as the wider the power the greater is the necessity for application of judicial mind.

27. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act' are based on this rule. 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."

(ii) The Hon'ble Supreme Court in ***Criminal Appeal No.1021 of 2022*** titled as "***Varsha Garg vs. The State of Madhya Pradesh & Ors.***, decided on 08.08.2022, has held as under:

"This power can be exercised at any stage of any inquiry, trial or other proceeding under the Cr.P.C. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

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 re-examine 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."*

(iii) A three Judges Bench of Hon'ble Supreme Court in a judgment titled as ***Harendra Rai vs. The State of Bihar & Ors. 2023 AIR (Supreme Court) 4331***, has held as under:-

“112. section 311 CrPC, 1973 confers wide powers on any court at any stage of any inquiry, trial or other proceeding under this Code to summon material witness or examine person present. Such person may not be a person summoned as a witness. Power to recall and re-examine is also vested. The concept is that it should be essential for the just decision of the case.”

II Re: Section 165 of Evidence Act, 1872

The Hon'ble Supreme Court in a judgment titled as ***Zahira Habibulla H. Sheikh and Anr. vs. State of Gujrat and Ors.*** 2004(2) R.C.R. (Criminal) 836 held as under:-

“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 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 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 Courts cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly 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.

*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 ***Mohan Lal v. Union of India***(1991 Supp.(1) SCC 271) this Court has observed, while considering the scope and ambit of Section 311, that the*

very usage of “words such as, ‘any Court”, “at any stage”, or “any enquiry or trial or there 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 judicially 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 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 necessary 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.

45. It is not in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, that Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

46. *Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of anyone party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.”*

Analysis (re law)

8. An analytical perusal of the statutory provision of Section 311 of Cr.P.C. reflects that it vests a criminal Trial Court with following powers, viz:

- (a) To summon any person to be examined as a witness (when such person has earlier not been examined as a witness),
- (b) To record the testimony of any person, present in Court, as a witness even though such person has not been summoned as a witness,
- (c) To recall any person, who has been earlier examined as a witness, for his re-examination/further cross-examination as a witness.
- (d) To summon above said person(s) at any stage of proceedings till the Court is seized of the matter i.e. before pronouncement of judgment (in case accused is acquitted) and order of sentence (in case accused is convicted),
- (e) To summon above said person(s) in all kinds of proceedings before such Court including inquiry or trial. To clarify, a trial Court would be empowered in law to summon a person as a witness even while considering the quantum of sentence to be awarded to a convicted accused.

8.1 Further, the provision of Section 311 of Cr.P.C. comprises of two distinct parts namely:

- (a) *First Part*; wherein the word used is “may”.
- (b) *Second Part*; where the words used is “shall”.

The Hon’ble Supreme Court in the cases of ***Zahira Habibullah Sheikh-2006*** (supra), ***Varsha Garg*** (supra) and ***Harinder Rai*** (supra) have held that the *first part* vests the Court with a discretion whereas the *second part* casts a bounden mandatory duty upon the Court, to bring on to the record, evidence of such person keeping in view the paramount objective that such evidence should “*appear to be essential to the just decision of the case*”. Accordingly, it can be safely inferred that the power vested in a criminal trial Court by virtue of Section 311 of Cr.P.C. is akin, if not alike, to an unfettered replete power aimed at securing the cause of justice. The Hon’ble Supreme Court in the case of ***Zahira Habibullah H. Sheikh-2004*** (supra) has held that a criminal trial Judge is required to play a participatory role in such trial and cannot reduce his role to that of an umpire/referee only. The provisions of Section 165 of Evidence Act when read in unison with the provisions of Section 311 of Cr.P.C., in light of ratio decidendi of the above judgments of the Hon’ble Supreme Court, leads to the inevitable conclusion that a criminal trial Court should exercise power vested in it under Section 311 of Cr.P.C as an empowering tool in its quest for arriving at the truth and dispensing justice. It goes without saying that the salutary legislative mandate underlying Section 311 of Cr.P.C., giving unbridled power to a criminal trial Court, is galore in the words “*appears to be essential to the just decision of the case*”. By no stretch of legal imagination, it can be

inferred that the legislature has put any fetters to the power of a criminal trial Court in this regard. Such an exercise of power by a criminal trial Court cannot fall within the mischief of *actus curiae neminem gravabit*.

8.2 The right to cross-examine a witness, vested in the prosecution/accused during the course of criminal trial, is an infallible right which cannot be withered away except in accordance with law. In case, the cross-examination of a witness could not be aptly undertaken by the prosecution/accused, such side would be well within its right to seek recall of such witness for further cross-examination in terms of Section 311 of Cr.P.C. on showing sufficient cause. The innate nature of the provision of Section 311 of Cr.P.C., when viewed with reference to the objective it seeks to achieve, empowers a Court to allow cross-examination of a witness even if such cross-examination was earlier foreclosed for any reason by a Court order. Same would be the analogy applicable to a case wherein the evidence on behalf of any rival side, in a criminal trial, is closed by Court order.

8.3 This Court must hasten to add a word of caution herein that exercise of the power under Section 311 of Cr.P.C. must be undertaken by a criminal trial Court in an assiduous manner, in accordance with the settled norms of justice and fair play & such criminal trial Court should not be drifted away by over-zealousness. It goes without saying that such adjudication must be supported by cogent rationale reflecting due judicial application of mind.

8.4 As an epilogue to the above rumination, the following principles emerge:

(I) The broad gamut for exercising power by a criminal trial Court under Section 311 of Cr.P.C. are as follows:

(i) The prime factor for considering a plea under Section 311 of Cr.P.C. is as to whether such evidence “*appears to be essential to the just decision of the case.*”

(ii) Section 311 of Cr.P.C. can be invoked by a criminal trial Court even when cross-examination of a witness has earlier been foreclosed by a Court order. Such exercise of power by the Court cannot be construed as the concerned Court recalling/reviewing its own order.

(iii) Section 311 of Cr.P.C. empowers a criminal trial Court to even allow further examination/cross-examination of a witness at instance of the prosecution/accused.

(iv) A criminal Court is well within, its judicial discretion, to summon any person as a witness at any stage of proceedings/trial etc. till such Court is seized of the matter.

(v) A criminal trial Court may exercise power under Section 311 of Cr.P.C. on an application made by a party to *lis* or on its own volition.

(vi) Successive application(s) for summoning same witness for examination/re-examination is not debarred but such a plea deserves to be dealt with exercising a higher degree of circumspection.

(II) No straight jacket formulae can be enumerated regarding mode, manner and extent of exercise of power under Section 311 of Cr.P.C by a criminal trial Court as every case has its own unique facts/circumstances. It is neither possible nor pragmatic to lay down any such exhaustive guidelines as every case is *sui generis* in terms of factual conspectus.

(III) Needless to say that exercise of power under Section 311 of Cr.P.C. by a criminal trial Court should be undertaken by according cogent

and lucid reasons, in accordance with basic principles of our criminal jurisprudence, for such exercise of its power.

Analysis (re-facts of present case)

9. The impugned order arises from a trial being undertaken against the petitioner (herein) for offences under Sections 406/498-A/120-B of IPC. A perusal of the paper-book reveals that on 30.08.2023, the witness in question i.e. PW-1 (Sukhraj Kaur) was present and was examined-in-chief and her cross-examination was deferred. On the next date of hearing i.e. 11.09.2023, no prosecution witness including the said witness PW-1 (Sukhraj Kaur) was present and the proceedings in the trial were deferred to 27.09.2023. On the said date i.e. 27.09.2023, the Bar Association at Patti had observed “No-Work day” and hence the trial proceedings were deferred to 16.10.2023. On that day i.e. 16.10.2023, the concerned witness (PW-1-Sukhraj Kaur) did not come present and accordingly hearing was deferred to 23.10.2023, subject to payment of costs of Rs.200/- to be paid by the complainant/witness. On the eventful day i.e. 23.10.2023, the defence counsel did not cross-examine the said witness and an adjournment was sought for. The said adjournment was declined and cross-examination of PW-1 (Sukhraj Kaur) was directed to be treated as ‘Nil’ despite opportunity having been given. In this background, an application under Section 311 of Cr.P.C. was filed on behalf of the accused wherein a prayer was made for recalling PW-1 (Sukhraj Kaur) as to enable the defence to cross-examine her. The said application was opposed by the State and the complainant and reply thereto was also filed. It is in this factual backdrop, the impugned order dated 06.12.2023 was passed by learned trial Court.

10. The factual conspectus of the matter in hand reflects that though examination-in-chief of PW-1 (Sukhraj Kaur) was conducted on 30.08.2023 yet the same was deferred on three other dates for one reason or the other including non-absence of said witness on two dates. Even costs were imposed on the complainant on 16.10.2023 on account of her non-appearance for the purposes of her cross-examination as a prosecution witness. It is trite law that the cross-examination of a prosecution witness serves as edifice to the defence of an accused. By way of the application in question, the recalling of such witness for the purpose of cross-examination was sought for. This aspect assumes more importance in the present case as the witness who is sought to be recalled for cross-examination is a prime prosecution witness, being victim as also FIR-complainant. By way of the impugned order, the learned trial Court has dismissed the application in question by holding that the witness had appeared in Court for cross-examination on 23.10.2023 but she was not cross-examined by the defence counsel despite the case having called several times; no oral or written request was made by the defence counsel for adjournment; the case was in the category of 'Action Plan Cases' being a case pertaining to the year 2016, therefore expeditious culmination of the trial was required; the ground stated in the application that the defence counsel was busy in another Court is not a plausible reason & the Court did not have the power to recall order dated 23.10.2023 whereby an opportunity to cross-examine was directed to be treated as 'Nil'.

11. Keeping in view the entirety of the facts and circumstances of the present case; the present petition deserves to be accepted, impugned

order deserves to be quashed and the application in question warrants to be granted for the following reasons:

- (i) The power of a trial Court under Section 311 of Cr.P.C. to allow re-examination of a witness for the purpose of conducting cross-examination of such a witness is well within the realm of Section 311 of Cr.P.C. In case a Court had earlier passed an order foreclosing cross-examination of a witness, such cross-examination can well be permitted by exercising the power under Section 311 of Cr.P.C. Such exercise of power shall not amount to recalling of earlier order whereby cross-examination of a witness was foreclosed. Hence the trial Court erred in declining the application in question on the premise that grant of application in question would amount to recalling of its earlier order whereby cross-examination was directed to be treated as 'Nil'.
- (ii) The witness in question (PW-1-Sukhraj Kaur) was examined in-chief on 30.08.2023 whereinafter on three dates of hearing i.e. 11.09.2023, 27.09.2023 & 16.10.2023, the said witness could not be cross-examined for one reason or other much less on account of any folly on part of the accused. Even costs were imposed upon the said witness vide order dated 16.10.2023 on account of her non-appearance. In this view of the matter, the learned trial Court ought to have exercised greater restraint in foreclosing the right of the accused for cross-examining the prosecution witness. The said error could, nevertheless, be rectified by granting the application in question.
- (iii) The witness, whose cross-examination is sought to be conducted by the defence, is the prime prosecution witness being the complainant of the FIR as also the victim. The cross-examination of this witness is indeed pivotal to defence side. Allowing of such cross-examination would definitely tread towards effective and just decision of the trial.

Decision

12. The present petition is allowed; the impugned order dated 06.12.2023 passed by Judicial Magistrate Ist Class, Patti is quashed & the trial Court is directed to afford one clear opportunity to the petitioner (herein)-accused for cross-examination of PW-1 (Sukhraj Kaur). This shall, however, be subject to payment of Rs.5,000/- as costs to be paid to the District Legal Services Authority, Tarn Taran, Punjab. The payment of costs, shall be a condition precedent, for allowing cross-examination of PW-1 (Sukhraj Kaur) as directed hereinabove.

(SUMEET GOEL)
JUDGE

February 21, 2024
Ajay

Whether speaking/reasoned:	Yes
Whether reportable:	Yes