

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-15740-2021 (O&M)

Date of decision:01.04.2024

Sunny Bajwa and another
V/s
..... Petitioners

State of Punjab and others
..... Respondents

CORAM: HON’BLE MR. JUSTICE SUMEET GOEL

Present: Mr. Ranjan Lakhanpal, Advocate for the petitioners.
Mr. Adhiraj Singh, AAG Punjab.
Mr. Nitin Rathor, Advocate for respondent No.2.
Mr. K.K. Gupta, Advocate for respondent No.3.
None for the applicant in CRM-40792-2021.

SUMEET GOEL, J.

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 laying challenge to the order dated 08.03.2021 passed by Special Judge, SAS Nagar, Punjab whereby application; filed under Section 311 of Code of Criminal Procedure, 1973 (hereinafter to be referred as the ‘Cr.P.C.’), for re-examining the victim/PW-2 as also for providing necessary protection to her as also her family, has been dismissed.

Factual backdrop

2. A FIR bearing No.78 dated 22.08.2020 came to be registered at Police Station Kurali, District SAS Nagar, Punjab under Sections 376/506/120-B of IPC and Section 6 of POCSO Act, 2012 and Section 67-B of I.T. Act (added later on), relevant whereof reads as under:-

“Copy of statement of Parminder Kaur wife of Sarabjit Singh resident of House No. 548 ward No. 12 Singhpura Road Kurali, presently tenant of

Indira Rani wife of Pal Singh, resident of ward No. 9 Kurali, Police Station City Kurali, District SAS Nagar, age around 44 years. Mobile No. 95923-75665 state that I am resident of the abovementioned address. I am working at a canteen at Focal Point Chanalon Plot No. 18. I was married to Sarabjit Singh son of Avtar Singh, resident of House No. 548 ward No. 12 Singhpura Road Kurali during the year 2004. Out of this wedlock I have three children. My eldest daughter is Ravneet Kaur she is around 14 years and 7 months old, Younger to her is my daughter Deepti age around 12 years. Younger to her is my son Yuvraj, age around 5 years. My eldest daughter Ravneet Kaur is studying in matric at National Public School Morinda Road Kurali. House No. 548 is our ancestral house. In this house my parents and my three children stay with their paternal grandparents. On date 22.03.2020 due to promulgation of lock down my younger brother-in-law Dharminder Singh, who is serving in army has been posted to Asam, he availed his leave and on 17.06.2020 returned to re-join his army unit. His family also came and started living with my in-laws. Today my daughter Ravneet Kaur intimated me that in between 18.06.2020 to 22.06.2020 her aunt Nimo Kaur called her male friend to her house at 12:30 AM in the night time. At that time her grandparents were not present at their house. Then my aunt woke me up and asked me to bring cold drink. Though I declined but my aunt pressed me to bring cold drink in three glasses. I brought cold drink then my aunt mixed some intoxicant in my cold drink glass. After consuming this cold drink I became unconscious. When I regained consciousness I noticed that my clothes were drenched in blood. When I enquired this incidence from my aunt then my aunt intimated me that she has filmed my video. She threatened me that if I disclose this incidence to anyone then they (my aunt and her male friend) will eliminate me. Due to this threat I was scared. My aunt Nimo Kaur threatened me and sent me along with her male friend to different hotels at Kharar and Mohali and got me raped me by that person many times without my consent. I was too much scared that I could not disclose this to any of my family members or our relatives. My daughter often remained perplexed. I repeatedly enquired the reason from her. Then she disclosed the abovementioned incidence to me. She intimated that she can recognise that person if she see him. Today I along with my daughter Ravneet Kaur was going to the Police Station to get our complaint registered. You have met me near Singhpura Stadium Kurali. Action should be taken. I have got registered my statement on your laptop. I have read it, same has been read over to me and it is correct. Action should be taken. Statement made by Sd/- Parminder Kaur”

2.1. Investigation was thereafter carried out and challan (report under Section 173 of Cr.P.C., 1973) was presented against accused namely Nimmo Kaur and Parvinder Singh. During the course of trial proceedings, testimony of the complainant (mother of the victim) namely Parminder Kaur was recorded on 19.01.2021 wherein the said witness was declared hostile by the learned Public Prosecutor. Similarly, on 19.01.2021 itself, statement of PW-2/victim namely Ravneet Kaur was recorded who was also declared hostile by the learned Public Prosecutor.

2.2 Thereafter, on 12.12.2021, an application under Section 311 of the Code was filed (hereinafter to be referred as ‘application in question’) on behalf of the petitioners (herein) for re-examining of victim/prosecutrix namely Ravneet Kaur and providing necessary protection to her as also her family. The said application was supported, during the course of arguments before trial Court, by the complainant whereas it was opposed by the accused. In this factual background, the application in question was dismissed vide impugned order whereafter the instant petition came to be filed before this Court.

2.3 An application (CRM-40792-2021) was filed in the present main petition on behalf of the complainant (mother of the victim) as also the victim seeking intervention as also to make submissions at the time of arguments. However, none has appeared in support of the said application on 13.12.2022, 20.02.2023, 27.02.2023, 01.02.2024, 06.02.2024, 20.02.2024, 26.02.2024, 07.03.2024 as also on 15.03.2024 when final arguments in this case were heard and judgment was reserved.

3. I have heard learned counsel for the parties and have perused the record with their able assistance.

4. The prime issue for consideration in the present petition is as to whether the application filed under Section 311 of the Code by the petitioners ought to be allowed in the facts and circumstances of the case. The analogous legal issue that arises for consideration is as to who is entitled to file/maintain an application under Section 311 of the Code.

Relevant Statute

5. 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 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:

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

I Re: section 311 of Cr.P.C., 1973.

(i) In a case titled as “***Karamjit Singh vs. State of Punjab and another, Neutral Citation No.2024:PHHC:024178***”, decided on 21.02.2024, this Court has held as follows:-

“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 above judgments of 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 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.

xxxx xxxx xxxx xxxx

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 guide-lines 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.”*

(ii) The Hon’ble Supreme Court in a judgment titled as ***Rajaram Prasad Yadav vs. State of Bihar and another, 2013(14) SCC 461***, has held as under:

“23. 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:

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 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.*
- 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 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.*
- 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 Cr.P.C. 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 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. ”

II Re: Who is entitled to file an application under Section 311 of Cr.P.C., 1973

(i) In a case titled as “***Khatta Singh vs. C.B.I. Chandigarh and others, 2018 (3) RCR (Criminal) 708***, decided on 23.04.2018, this Court has held as follows:-

“(26) Similar would be the position with regard to the objection of the counsel for the accused that the application of the petitioner would not be maintainable as he is neither the complainant nor has the application being filed by the prosecution. As is apparent from the language of the provisions itself, it is the discretion of the Court to be exercised in the given facts and circumstances whether the evidence, which is likely to be received by it from the person or persons as have been provided for under the Section itself, would be essential to the just decision of the case. It is open to the Court to suo moto exercise such powers and obviously, from whatever source, the Court receives information with regard to its satisfaction about the evidence and its essentiality for the decision of the case, does not really make any difference, it can be from any source. The Court has a duty to call the attention of the witness to it, whether it makes for or against the prosecution as the aim of the Court being neither to punish the innocent nor screen the guilty, but to administer the law correctly. Counsel seeks only for the success of his client but the Judge must watch that the justice triumphs, meaning thereby that the paramount principle underlying under Section 311 Cr. P.C. is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. ”

Analysis (re law)

7. This Court, in the judgment of ***Karamjit Singh*** case (supra), has held that the power vested in the criminal trial Court by virtue of Section 311 of Cr.P.C., when read along with the provision of Section 165 of Evidence Act, clearly affirms that such power is cognate with, if not alike, to an unbridled replete power aimed at securing the cause of justice. The power vested in a criminal Court is aimed at providing all requisite repository power to such a Court to enable it to effectively engage in undaunting pursuit for arriving at the truth and justice. The supreme touch stone is that such evidence should appear to be essential to the just decision of the case. It is worthwhile to notice herein that a criminal trial Court, when exercising its power under Section 311 of Cr.P.C., is not required to analytically evaluate such evidence at that stage. The only prerequisite is that such evidence “appears” to be essential to the just decision of the case. A criminal trial Judge is bound, in law, to play a participatory role in a trial and cannot reduce his role to that of a mere spectator or recorder of events. The Hon’ble Supreme Court in case of ***Rajaram Prasad Yadav*** (supra) has laid down that the power under Section 311 of Cr.P.C. deserves to be exercised for the salutary purpose of a fair trial which essentially entails the interest of all concerned including accused, prosecution, complainant, victim as also the Society at large.

7.1 The statutory framework of Section 311 of Cr.P.C.; when examined in the light of case of ***Karamjit Singh*** (supra); irresistibly reflects that a criminal trial Court may exercise these powers on its own volition or an application made by a party to the trial in question i.e. the accused, prosecution, complainant as also the victim. This Court in the case of ***Khatta Singh*** case (supra) has held that such a plea can also be made by the

witness. A deeper critical analysis, of the words used by the legislature while enacting Section 311 of Cr.P.C., does not show that such power cannot be invoked by any other person including a person seeming to be a rank stranger to the trial. In other words; the provisions, when construed in light of salutary objective which it thrives to achieve, unequivocally exhibits that criminal trial Court is well within its power to invoke Section 311 of Cr.P.C. at the asking of any person *whosoever* provided such evidence appears to be essential to just decision of the case. To put it in another way, in a given case if the facts/circumstances of such case so warrant, a criminal trial Court is well within its power to entertain a plea under Section 311 of Cr.P.C. even at the instance of an apparent rank stranger who seeks to intervene, unannounced, in trial proceedings. However, a Court while exercising its powers at the instance of such a seemingly stranger/unconcerned person must tread more cautiously and carefully.

7.2. Although there is no impediment, statutory or otherwise, in the trial Court invoking its power under Section 311 of Cr.P.C. on an oral plea at the instance of any person, yet it would be pragmatic approach if such person causes an application to be moved in this regard.

7.3 There is no gainsaying that it is neither fathomable nor axiomatic to lay any exhaustive guidelines for governing such judicial discretion & exercise of such power would essentially depend upon facts/circumstances of particular case.

8. As a sequel to above ruminative discussion, the following principles emerge:

(I) A criminal trial Court may exercise power(s) under Section 311 of Cr.P.C of 1973 not only on a plea by a party to the trial including accused,

prosecution, complainant and witness or on its own volition but also on a plea of a person who is seemingly rank stranger to the trial.

(II) Whenever invocation of such power is sought for, at the instance of a person who is seemingly rank stranger/who is not a party to the trial; such criminal trial Court ought to exercise its powers with a much higher degree of circumspection. It goes without saying that according of cogent and convincing reason(s) would be a condition precedent to exercise of such power.

(III) A person (whether party to the trial or otherwise) may seek to invoke power(s) of a criminal trial Court by making a written or oral plea. However, it would be axiomatic that a criminal Court, ordinarily entertains such a plea by way of written application.

Analysis re facts

9. Now this Court reverts to the facts of the present case.

9.1 The application under Section 311 of Cr.P.C. was filed at the instance of petitioners (herein) namely Sunny Bajwa and Deepika Bajwa who are stated to be relatives of the victim. There is no dispute that, in view of the above said discussion, any person is entitled to seek intervention of a Court in terms of powers of such Court under Section 311 of Cr.P.C. However, the *locus-standi* of the petitioners (herein) with the trial in question is marred by doubt and suspicion. No plausible reason is coming forward as to why the victim and/or the complainant (mother of the victim) have not come forward to file any application under Section 311 of Cr.P.C. From the factual matrix of the present case; no impediment has been shown in the way of complainant (mother of the victim) and/or victim in making such a plea before the trial Court. Though, during the course of arguments

in the application in question before the trial Court, the complainant had supported the cause put forward in the application in question but that by itself does not render plausible explanation as to why the application in question was not filed by the complainant and/or victim.

9.2. By way of application in question; re-examination of only the victim (PW-2) has been sought for whereas there is no prayer for re-examination of the mother of the victim (complainant)/(PW-1) who had also been declared to be a hostile witness on the same day when the victim (PW-2) had been declared to be a hostile. No explanation has come forth in this regard, either in the application in question or during the oral arguments made before this Court.

9.3 When the complainant as also the victim were examined during the trial proceedings on 19.01.2021, specific questions were put to them by the trial Court as to whether they were making statements truthfully, voluntarily or without any pressure which questions were replied to in affirmative by them.

9.4. The trial Court has extensively dealt with the allegation of threat in the impugned order; relevant whereof reads as under:

“However, in the present case, the application moved under Section 311 Cr.P.C. does not inspire confidence as there are many material discrepancies in the version mentioned in the application for re-examination and the version of the uncle and aunt (chacha-chachi) of the prosecutrix given to the police on 31.01.2021. As per the application under Section 311 Cr.P.C., the accused Parminder Singh’s men had threatened the prosecutrix on 18.01.2021 while she was coming back from tuition at 4:00 P.M. whereas as per the application dated 31.01.2021, it was accused Parminder Singh who had threatened the prosecutrix and the date of incident is mentioned as 28.01.2021. As per the application before the police, the prosecutrix was threatened by accused Parminder Singh on 28.01.2021 (whereas he is in custody since 22.08.2020). The date of

examination of the prosecutrix was on 29.01.2021 and the application reporting the said threat was moved on 31.01.2021, which means that the matter was reported by chacha-chachi to the police a day after her examination, whereas as a matter of fact, the prosecutrix was examined in court on 19.01.2021. Now, if it is to be argued that the dates mentioned in the police complaint have been wrongly mentioned because of typographical error even then as per the said complaint, the prosecutrix told about the threat incident to the complainant when she came out of the court after giving her statement. Had it been so, there is no explanation coming forth as to why the matter was reported to the police after 12 days and that too by paternal uncle and aunt and not by the mother of the prosecutrix to whom the prosecutrix had informed about the incident and who happens to be the complainant, ”

9.5. Status report dated 15.09.2022 filed by the State of Punjab, in the present petition, also shows that the allegations made by the petitioners (herein) regarding the threat having been extended by the accused-Parvinder Singh to the victim were found to be false. The relevant part of the status report reads as under:

“9. That it is respectfully submitted that a fair and impartial enquiry was conducted into the aforesaid complaint, however, the averments made in the said application were found to be false and not substantiated with any kind of evidence as the accused were found to be in judicial custody at that point of time. It further came to light that the father of the accused Parvinder Singh is an old person and not a member of SGPC as alleged and his other son is in Australia thus, there is no question of extending threat to her. It further came to light that on the alleged day of occurrence, no phone call was made to police helpline No. 100 or 112 by the prosecutrix or any other members of her family and it is surprising that her parents are not even aware of any such development. Moreover, alleged place of occurrence is a crowded place no effort was made to alert any shopkeeper around. Consequently, the said complaint of the petitioner was filed in the office. ”

9.6 In view of the above, this Court does not find any error in the impugned order passed by the trial Court. In the considered opinion of this

Court the trial Court has appropriately dealt with the application in question by declining the same. Hence the present petition deserves to be dismissed.

Decision

10. Consequently, the present petition is dismissed & the impugned order dated 08.03.2021 passed by Special Judge, SAS Nagar, Punjab dismissing the application under Section 311 Cr.P.C., 1973 filed by petitioners (herein) is upheld.

10.1 Needless to state herein that nothing said hereinabove shall be construed as an expression of opinion on the merits of the case.

(SUMEET GOEL)
JUDGE

April 01, 2024
Ajay

Whether speaking/reasoned:	Yes
Whether reportable:	Yes