

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-22278-2023

Reserved on: January 15, 2024

Pronounced on: January 19, 2024

Kiran Singhal and another

...Petitioners

Versus

State of U.T. Chandigarh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: - Mr. N.C. Kinra, Advocate for the petitioners.

Mr. Manish Bansal, P.P., U.T., Chandigarh.

Mr. Anand Dutt Sharma, Advocate for respondent No.2.

DEEPAK GUPTA, J.

By way of this petition filed under Section 482 Cr.P.C., petitioners pray to set aside the order dated 10.04.2023 (Annexure P-6) passed by learned Judicial Magistrate 1st Class, Chandigarh, in case titled *“State v. Kiran Singhal and others”*, arising out of FIR No.60 dated 09.03.2018 under Sections 323, 325 and 34 of IPC, registered at Police Station Maloya, Chandigarh, whereby application under Section 311 Cr.P.C. for examination of an additional witness, namely Surinder Pal Singh, was allowed.

2. FIR in question (Annexure P-1) was lodged on the complaint of respondent No.2 Simpy Singhal, as per which after the death of her

husband Varun Singhal on 05.07.2013, her father-in-law Bhagwat Prashad, mother-in-law Kiran Singhal (petitioner No.1) and brother-in-law Sameer Singhal (petitioner No.2) had started harassing her. She made complaints to the police many times. On 28.02.2018, the aforesaid accused came up stairs and opened her room despite stay order by the Court. It is alleged that her mother-in-law and father-in-law caught hold of her by hair and pulled her at about 7.30 a.m., whereas her brother-in-law gave her slaps, caught hold by her hands and twisted them, due to which she got fracture in the finger of her left hand. She called the police by dialing at 100. PCR came at 7.53 a.m. but went away after enquiring from the ground floor. She (complainant) then went to her neighbours along with her son. Her entire finger had got a bend. Her neighbours again called at 100 and PCR came at 8.05 a.m. She was then sent to Govt. Hospital, Sector 16, Chandigarh for providing medical treatment.

3. Necessary investigation was carried out. Both the petitioners along with Bhagwat Prashad Singhal were charge-sheeted under Sections 325/34 IPC, as per Annexure P-3.

4. During trial, an application under Section 311 Cr.P.C. (Annexure P-4) was moved by the complainant stating therein that on the date of incident, when injuries were caused to her, she had approached her neighbour, namely Surinder Pal Singh and his wife and narrated the incident to them and who had immediately called the PCR by dialing 100. It was further submitted that PW4 Inspector Ashok Kumar during his

cross-examination stated that he had not associated any neighbour or any independent person, which fact was incorrect because Surinder Pal Singh had called the police being the immediate neighbour of the complainant and therefore, summoning of said Surinder Pal Singh was necessary and crucial.

5. The accused-petitioners filed reply (Annexure P-5), opposing the application, submitting that accused had already disclosed their defence; that almost all the prosecution witnesses including the doctor and the Investigating Officer had been examined and that name of Surinder Pal Singh did not figure in any document and so, a vain attempt was being made by the complainant to introduce Surinder Pal Singh as a witness after lapse of more than four years and that allowing the application will prejudice the valuable right accrued to the accused.

6. After hearing both the sides, learned Trial Court vide impugned order dated 10.04.2023 (Annexure P-6) allowed the application after observing that examination of witness Surinder Pal Singh was very material to decide the case in proper manner.

7.1 Impugning the aforesaid order, it is contended by learned counsel for the petitioners that the application was moved at the fag end of the trial and that too after the cross-examination of the complainant and that allowing the application shall prejudice the accused, who had already diverged their defence and thus, valuable right accrued in his favour stands prejudiced. Learned counsel further contends that power under Section

311 Cr.P.C. has been exercised in an arbitrary manner by the Trial Court concerned without giving any reasons for not moving the application earlier. Learned counsel further contends that neither in the FIR nor in the investigation, the name of Surinder Pal Singh is reflected and only a vague and indefinite word “neighbours” was used.

7.2 Learned counsel has referred to *“Shiv Lal @ Sholly v. State of Punjab”, 2018(2) Law Herald 1408: P&H*, in order to contend that when there was no statement of a witness recorded or available in the police file nor the same was filed in the challan or the supplementary challan, the Trial Court could not have acted on the basis of application moved by the defacto complainant.

7.3 Learned counsel has further referred to *“Shonika @ Sonika Ramesh Salunkhe v. The State of Maharashtra”, 2021 CriLJ 3727 [Bombay HC]*, to contend that impugned order passed by the Trial Court would seriously prejudice the accused, who had put forth his defence at the time of arguments and that application filed by the prosecutor at a belated stage with the sole intent of filing in the lacunae, when no reasons were given for not examining the said witness earlier, nor it is mentioned that how the examination of this witness is essential to the just decision of the case, the power under Section 311 Cr.P.C. cannot be exercised to fill up the lacunae.

7.4 Further reference is made to *“V. Vani v. V.B.V.S.M.K. Prasad and others”, 2012(8) R.C.R. (Criminal) 2063 [Andhra Pradesh HC]*, in

which it has been held by the Andhra Pradesh High Court that right of a party to invoke Section 311 Cr.P.C. at any stage of the proceedings has to be tested on the touch stone of prejudice, if any going to be caused to the accused and that accused cannot be put to a surprise by bringing names of witnesses as and when the prosecution or the complainant wants to introduce them. It was held further that prosecution is required to disclose the entire prosecution evidence. i.e., proposed to be let in during trial and furnish copies of the documents relating to the said witnesses to the accused before start of the trial.

7.5 By submitting that the impugned order shall prejudice the defence of the accused, prayer is made for setting aside the same.

8. Refuting the aforesaid contentions, learned State counsel assisted by learned counsel for the complainant submits that it was disclosed in the FIR itself that complainant had approached her neighbours, when injuries were caused to her by the accused and those neighbours called the police by dialing 100 and simply for the reason that name of the neighbours as Surinder Pal Singh is not mentioned in the FIR, cannot be a reason to infer that Surinder Pal Singh is being wrongly introduced as a witness. Learned state counsel further submits that lapse on the part of Investigating Officer in not joining the neighbour, despite specific reference in the FIR, cannot be a reason to prejudice the case of the complainant. Prayer is made for dismissal of the petition.

9. I have considered submissions of both the sides and have also

appraised the record.

10. Section 311 Cr.P.C is relevant in this case, which read 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.”

11. Recently, Hon'ble Supreme Court in ***Varsha Garg Vs. The State of Madhya Pradesh and others*** – Criminal Appeal No.1021 of 2022 decided on 08.08.2022, has discussed the scope of Section 311 and Section 91 Cr.P.C., besides Section 65 of the Evidence Act. It has been held as under: -

“This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. 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.*

12. After referring to the observations made in *Mohanlal Shamji Soni vs. Union of India (1991) Supp (1) SCC 271*, Hon'ble Supreme Court further held in *Varsha Garg (supra)*:

*'31 Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P. (1979) 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 reexamine 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 facts and circumstances of each case."

Hon'ble Supreme Court further held in *Varsha Garg (supra)*:

*"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 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.

33 Section 91 CrPC empowers inter alia any Court to issue summons to a person in whose possession or power a document or thing is believed to be, where it considers the production of the said document or thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the CrPC.

34 Section 91 forms part of Chapter VII of CrPC which is titled “Processes to Compel the Production of Things”. Chapter XVI of the CrPC titled “Commencement of Proceedings before Magistrates” includes Section 207 which provides for the supply to the accused of a copy of the police report and other documents in any case where the proceeding has been instituted on a police report. Both operate in distinct spheres.”

13. Hon'ble Supreme Court in **Varsha Garg (supra)** further dealt with the objections of the opposite party to the effect that application under Section 311 Cr.P.C should not be allowed, as it would lead to filling up the lacunae of the prosecution case. It was held that even the said reason cannot be absolute bar in allowing the application under Section 311 Cr.P.C. Hon'ble Supreme Court held under: -

“39. In the decision in Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, which was more recently reiterated in Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd. (2008) 11 SCC 108, the Court specifically dealt with this objection and observed that the resultant

filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:

*“28. 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.”*

(emphasis supplied)

*40 The right of the accused to a fair trial is constitutionally protected under Article 21. However, in **Mina Lalita Barua v. State of Orissa (2013) 16 SCC 173**, while reiterating **Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110**, the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In **Rajendra Prasad (supra)**, the Court had held that:*

*“8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. **No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

(emphasis supplied)

14. Further, in **Varsha Garg (supra)**, dealing with the objection regarding the stage, at which the application under Section 311 Cr.P.C can be moved, Hon'ble Supreme Court held that Court is vested with a broad and wholesome power in terms of Section 311 Cr.P.C., to summon and resummon or recall and re-examine any material witness at any stage and that closing of the prosecution evidence is not an absolute bar. In this regard, Hon'ble Supreme Court noted as under: -

*“42..... Further, in **Zahira Habibullah Sheikh (5) (supra)**, the Court reiterated the extent of powers under Section 311 and held that:*

“27. 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, enquiries 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 any 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.”

(emphasis supplied)

43 The Court while reiterating the principle enunciated in **Mohanlal Shamji Soni (supra)** stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

*“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 **Mohanlal v. Union of India** this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other 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 judiciously 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 some evidence which is necessary for a just and proper 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 necessity 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.”

(emphasis supplied)

15. Applying the legal position as explained by the Hon'ble Supreme Court in *Varsha Garg (Supra)*, to the facts of the present case, it is noticed that it was specifically mentioned by the complainant in the FIR that when she was given beatings by the accused, she had called the police, but the police was sent back from the ground floor itself. She then approached her neighbours, who called the police again. The police then came to the spot and then she was taken to the hospital by the police. Thus, there is a specific reference of the neighbour in the FIR itself, who was called at the spot, though the name of the neighbour was not mentioned. Despite the specific reference of the neighbour, in case Investigating Officer did not make any attempt to join such neighbour in the investigation, that cannot be a reason to prejudice the case of the complainant. Since, it was stated by the Investigating Officer during this cross-examination that he did not associate the neighbour, though this fact is contrary to the contents of the FIR, therefore, learned Trial Court did not commit any error in observing that the examination of the witness Surinder Pal Singh, the neighbour of the complainant was necessary and material to decide the case in proper manner.

The accused-petitioners will get opportunity to cross-examine the witness.

No prejudice shall be caused to the defence by calling Surinder Pal Singh in additional defence.

16. As far as the authorities cited by learned counsel for the petitioners are concerned, no advantage can be given to the petitioners regarding the view taken therein, being contrary to the legal position explained by the Hon'ble Supreme Court in *Varsha Garg (supra)*.

17. In view of the aforesaid discussion, this Court does not find any merit in the present petition.

Dismissed.

January 19, 2024

Sarita

(DEEPAK GUPTA)

JUDGE

Whether reasoned/speaking:

Whether reportable:

Yes/No

Yes/No