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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-24987-2024 (O&M)
Date of decision: 17.05.2024

Sajan Masih

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Vipin Mahajan, Advocate
for the petitioner.

HARPREET SINGH BRAR, J. (ORAL)

1. Present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') seeking quashing of the impugned order dated 28.11.2023 passed by learned Additional Sessions Judge, Gurdaspur, vide which application filed by the petitioner under Section 311 Cr.P.C., for recalling PW12-prosecutrix for further cross-examination, in case bearing No.SC-254-2021 titled as '*State Vs. Sajan Masih*', arising out of FIR No.74 dated 17.07.2021 under Sections 363, 366, 376, 506 of the Indian Penal Code, 1860 (for short 'IPC') and Section 6 of The Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'), registered at Police



Station Kalanaur, District Gurdaspur, has been dismissed.

2. Briefly, facts of the case are that FIR (*supra*) was registered at the instance of respondent No.2-complainant with the allegations that he has four children; three daughters and one son. On the intervening night of 15/16.07.2021, they were sleeping in their house and when woke up in the morning, he did not find her daughter 'M' (name withheld) in the house. She was searched, but could not be found. He had apprehension that petitioner Sajan Masih had enticed away her on the pretext of marriage. One of his neighbour Bachhittar Masih informed the complainant that on 16.07.2021 at about 05.00 a.m., he had seen daughter of the complainant and the petitioner going towards Haqimpur Road.

3. Learned counsel for the petitioner, *inter alia*, contends that learned trial Court fell into grave error by not considering case of the petitioner in the right earnest. In the statements of the prosecutrix recorded under Section 164 Cr.P.C. and in her statement recorded on 20.09.2022, while she appeared as PW12, two different versions have been given by her and the petitioner has not been provided proper opportunity to effectively cross-examine the prosecutrix. As such, the petitioner filed an application under Section 311 Cr.P.C. and denial of the proper opportunity would amount to denial of free and fair trial to him.

4. Learned counsel for the petitioner further contends that no prejudice would be caused to the prosecution, in case the present petition is



allowed, as he would have the opportunity to effectively cross-examine the prosecutrix. Learned counsel for the petitioner relies upon the judgment of this Court passed in *Surjit Singh Vs. State of Punjab and others*, CRM-M-42890-2022, decided on 26.05.2023 and *Khushwinder Singh and another Vs. State of Punjab*, 2007 (1) R.C.R. (Criminal) 531.

5. Having heard learned counsel for the petitioner and after perusing the record of the case with his able assistance, it transpires that PW-12 prosecutrix was duly cross-examined at length by the previous defence counsel appearing for the petitioner-accused. Furthermore, statement of the prosecutrix under Section 164 Cr.P.C. and her examination-in-chief are part of the record and the same can be appreciated at the time of arguments. As such, this Court finds no reason to subject the prosecutrix to further cross-examination.

6. It is a settled position of law that the power under Section 311 of Cr.P.C. cannot be invoked in a routine manner but the same has to be exercised in exceptional cases, where the Court feels that the re-examination of a witness is essential for the just decision of the case. Moreover, the reliance placed upon by the petitioner on the judgments rendered by this Court in *Surjit Singh's* case (*supra*) and *Khushwinder Singh's* case (*supra*) do not further the cause of the petitioner. The arguments raised by learned counsel for the petitioner do not satisfy the test of being essential for the just decision of the case and he has not been able to make out a case that allowing re-examination of the prosecutrix will not amount to filling up of a lacuna and it



will not cause any prejudice to the case of the prosecution.

7. In the present circumstance, it is imperative to examine Section 311 Cr.P.C. The text of the said Section is provided below for reference:-

‘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.’

8. A two Judge Bench of the Hon’ble Supreme Court in ***V. N. Patil Vs. K. Niranjana, 2021 (2) R.C.R. (Criminal) 310***, examined the scope of the power under Section 311 of Cr.P.C and speaking through Justice Ajay Rastogi, the following was observed:

“Object underlying Section 311 Cr.P.C is that there may not be failure of justice on account of mistake of either party in bringing 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 significant expression that occurs is ‘at any stage of enquiry or trial or other proceeding under this Code’. It is however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said wider the power, greater is the necessity of caution while exercise of judicious discretion.”

9. The Hon’ble Supreme Court in ***Mohanlal Shamji Soni Vs. Union of India and another, AIR 1991 SC 1346*** has held that where the object of the accused in recalling witnesses already examined in the case is to



prolong the trial of the case, the Court would not allow such application. Moreover, the power under Section 311 of Cr.P.C is dictated by exigency of the situation based on the principle of fair play and goodwill and existence of the evidence being essential for the just adjudication of the case is the only guiding factor and that only the ends of justice requires the examination of any person which would depend to the facts and circumstances of each case. It was further held that it is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case. Such power may be exercised at any stage. However, the power is circumscribed by the principle underlying the section, that is, the evidence to be obtained must be essential for just decision of the case.

10. A Division Bench of this Court in ***Sukhdev Singh Vs. State of Punjab, 1982 Cr. LJ 2201*** has held as under:

“The discretion is required to be exercised by the Court keeping in view the just decision of the case unmindful of the fact whether any party before it gains or losses from the exercise of such discretion under this section. There is no doubt that object of the section is not to enable any one or the other party to fill up the gaps of its case. The section is not to be used to enable it to repair the lacuna. The sole criterion in such a case should be whether the exercise of power under section is necessary in the interest of justice. While exercising this discretion the court has to keep in its mind the well-known principle of law that the order should not operate as a rebuttal of the case set up by the defence after the prosecution case is closed. The use of this section cannot be limited only to something arising eximporviso which no human agency could see. The mere fact that evidence is permitted to be taken after the entire prosecution case is over is in itself in excess of the powers of the Court. No hard and fast rules can be



prescribed as to when and at what stage this discretion should be exercised. The anxiety for justice is paramount and should be kept in view. The Court should be unmindful of the fact of the use of the discretion in favour or against any party. The principle that such evidence should not demolish the case set up by the accused in his defence, if he has done so should be present in the mind of the judge at the time when he takes a decision. The powers of the Court under Section 311 which are very wide cannot be limited. The discretion can be exercised by the Court at any stage of the case, but on justifiable grounds". (emphasis added)."

11. In view of the law settled by the Hon’ble Supreme Court in the cases referred to above, this Court finds no illegality or perversity in the impugned order dated 28.11.2023 passed by learned Additional Sessions Judge, Gurdaspur. Accordingly, present petition is dismissed being bereft of merit.

[HARPREET SINGH BRAR]
JUDGE

17.05.2024
vishnu

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No