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

CRM-M-856-2017

Date of decision: 15.04.2024

Shyam Lal

....Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. D.K. Tuteja, Advocate
for the petitioner.

Ms. Geeta Sharma, DAG, Haryana.

Mr. Gagandeep Singh, Advocate for
Mr. Jarnail Singh Saneta, Advocate
for respondent No.2.

HARPREET SINGH BRAR, J. (ORAL)

The present petition has been filed under Section 482 Cr.P.C. seeking setting aside of order dated 15.12.2016 (Annexure P-5) vide which the application of the petitioner moved under Section 311 of Cr.P.C. for re-examination of PW-1 has been dismissed in case bearing FIR No.1164 dated 08.10.2015 under Section 376 of IPC and Section 4 of POCSO Act, registered at Police Station Chandni Bagh, Panipat.

The brief facts of the case are that on 07.10.2015, the daughter of the petitioner, namely, Kanika, was not found at home when petitioner returned home from his duty and after getting no information about her, the petitioner submitted an application to the Incharge of Police Post, Sector 29, Panipat. On 09.10.2015, the daughter of the petitioner came back to her house and told the

petitioner and her mother that the accused-Nitin took her to bus stand, Panipat, and made her to sit in a bus going to Delhi. Thereafter, she was asked to come to Amritsar. On reaching Amritsar, the accused-Nitin told her to come to Karnal. The accused met her at bus stand Karnal and brought her to Panipat where he took her to Royal Hotel, Anaj Mandi, Panipat. After taking a room, the accused gave her cold drink, after drinking of which, she became unconscious and the accused committed rape upon her. On the next day, she was handed over to two persons, namely, Rajender Singh and Hukam Singh and on the way to home, she was told not to disclose the facts to anyone otherwise they will kill her and her family members. It is further alleged that on the basis of investigation and medico legal examination of daughter of petitioner, the challan was presented against the accused-Nitin under Section 376 of IPC and Section 4 of POCSO Act. Thereafter, the prosecutrix suffered her statement under Section 164 of Cr.P.C. before the learned Judicial Magistrate on 12.10.2015 (Annexure P-1). It is further alleged that the case was committed to the Special Court constituted under the POCSO Act and after framing of charges against the accused under Section 376 of IPC and Section 4 of POCSO Act, the examination-in-chief of the prosecutrix was conducted on 15.02.2016, thereafter, cross examination of the prosecutrix was deferred on the request of the learned Public Prosecutor so as to enable him to file an application under Section 319 Cr.P.C. for summoning Rajender Singh. After filing the said application, the prosecutrix was re-called for cross-examination on 14.09.2016 and in the meanwhile, the brother of accused, namely, Vipin, as well as his companions threatened the prosecutrix with dire consequences to give her statement in favour of accused-Nitin and under the influence, threat and

pressure, she suffered a statement in favour of accused-Nitin. Thereafter, the application under Section 311 of Cr.P.C. was moved before the learned lower Court seeking permission for re-examination of PW-1-Kanika/prosecutrix. However, vide impugned order dated 15.12.2016 (Annexure P-5), the application seeking permission to re-examine the prosecutrix has been dismissed wholly on unsustainable grounds and aggrieved by the same, the petitioner has approached this Court.

Learned counsel for the petitioner *inter alia* contends that no prejudice would be caused to respondent No.2 in case the present petition is allowed as he would have the opportunity to subject the victim/prosecutrix to cross-examination. Moreover, it is in the interest of justice to have all the versions before the learned trial Court to decide the controversy in hand. It is further contended that the learned trial Court did not take into consideration the fact that the prosecutrix has disclosed the true genesis of offence in her statement suffered under Section 164 of Cr.P.C. (Annexure P-1) as well as when she appeared as a witness during her examination-in-chief. However, it was only in her cross-examination that the prosecutrix had made a U-turn and stated contrary to the initial version and she has resiled from her earlier statement on account of threat extended by the brother of the accused and his companions, regarding which, the petitioner has moved an application (Annexure P-6) before the Superintendent of Police, Panipat. Learned counsel for the petitioner further relies upon the judgment of this Court passed in 'Surjit Singh Vs. State of Punjab and others' CRM-M-42890-2022 (O&M) decided on 26.05.2023 and submits that in the given facts and circumstances, the trial Court was bound to re-call the prosecutrix and the failure to re-call her would result in denial of fair

trial. The learned trial Court has not considered the case of the petitioner in the right earnest in the light of the settled law and he further relies upon the judgment of this Court passed in '**Khushwinder Singh and another Vs. State of Punjab**' 2007 (1) R.C.R. (Criminal) 531 and submits that the prosecutrix has resiled from her earlier statement on being threatened by the brother of respondent No.2 and her re-calling would be essential for the just decision of the case, as such, it is obligatory on the part of the trial Court to summon and re-examine the prosecutrix. The underline principle behind the provisions contained under Section 311 Cr.P.C. is to have the best available evidence in the pursuit of justice.

Per contra, learned counsel for respondent No.2 submits that the allegations of the alleged threat by brother of respondent No.2 to the prosecutrix are totally baseless. The prosecutrix has resiled from her statement on 14.09.2016, whereas, the complaint (Annexure P-6) was given on 03.12.2016 after filing the application under Section 311 of Cr.P.C. It is further contended that the inconsistent stand of the complainant does not inspire confidence and cannot be relied upon in view of '**Suzuki Paras Rampuria Suitings Pvt. Ltd. v. Official Liquidator of Mahendra Petrochemicals Ltd.**' (2018) 10 SCC 707.

Having heard learned counsel for the parties and after perusing the record, it transpires that the reliance placed by the petitioner on the judgments rendered by this Court in **Surjit Singh (supra) and Khushwinder Singh and another (supra)** do not further the cause of the petitioner. The facts of the aforementioned cases are totally distinguishable as in **Surjit Singh's case**, the witness has turned hostile after effecting compromise with the accused.

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 the prosecutrix is essential for the just decision of the case. The learned Court below in impugned order has noticed the fact that the deposition of the prosecutrix before the Court was without any pressure or influence. The application in question was filed before the learned trial Court on 16.11.2016 after about two months of the cross-examination before the Court below. Further, on 14.09.2016, on the request of the learned Public Prosecutor, she was allowed to re-examine on behalf of the prosecution. As such, the learned trial Court has returned the finding that the deposition given by the prosecutrix on 14.09.2016 appears to be voluntary and conscious statement given by her out of her free will and consent. 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 the re-examination of the prosecutrix will not amount to filling up of a lacuna and it will not cause any prejudice to the accused. Further, the inconsistent stand made by any witness during the course of the trial is normally viewed as suspicious until and unless any explanation is provided for doing so.

In the present circumstance, it is imperative to examine Section 311 of the Code of Criminal Procedure. 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,

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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.'

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."

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

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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.

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 an 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).”

This Court is of the considered opinion that the power vested in the Court to recall or re-examine a witness is paramount in the pursuit of truth and the administration of justice when it becomes evident that a witness has turned hostile due to coercion or inducement and subsequently, the said witness wants

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to depose truthfully. However, in the present case, there is no indication that

such circumstances exist and thus, the present petition is dismissed accordingly.

(HARPREET SINGH BRAR)
JUDGE

15.04.2024
Neha

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No