

2024:PHHC:140871



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

**CRR-1429-2021 (O&M)
DECIDED ON: 01.08.2024**

IRSHAD

.....PETITIONER

VERSUS

STATE OF HARYANA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Vansh Chawla, Advocate
 for the petitioner.

Mr. Surender Singh Pannu, Addl. AG, Haryana.

SANDEEP MOUDGIL, J

1. The present criminal revision petition has been preferred against the impugned order dated 23.09.2021 passed by Additional Sessions Judge, Nuh vide which the application under Section 311 Cr.P.C. filed by the petitioner has been dismissed.
2. Learned counsel for the petitioner has submitted that the trial Court has not considered the issue regarding the land dispute which is pending since long between the families of accused and complainant and two incidents occurred after the incident of 17.04.2018, while cross-examining PW-5-USman. He further submits that there are various other issues since beginning upto the conclusion of investigation, which are left out.
3. Learned State counsel has submitted that the all the witnesses including PW-5-USman were cross-examined in detail. He prays for dismissal of the present petition stating that the petitioner has filed an application under Section 311 Cr.P.C.,

only on account of changed counsel and except that there is no other valid ground for filing the said application, which has rightly been dismissed by the trial Court vide impugned order dated 23.09.2021.

4. Heard.

5. The following principles will have to be borne in mind while dealing with an application under Section 311 Criminal Criminal Procedure Procedure Code read along with read along with Section Section 138 of the of the Evidence Act.”

(i) 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?

(ii) The exercise of the widest discretionary power under Section 311 Criminal Procedure Code 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.

(iii) 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.

(iv) The exercise of power under Section 311 Criminal Procedure Code 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.

(v) 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.

(vi) The wide discretionary power should be exercised judiciously and not arbitrarily.

(vii) 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.

(viii) The object of Section 311 Criminal Procedure Code simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(ix) 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.

(x) 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.

(xi) 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.

(xii) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(xiii) 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.

(xiv) The power under Section 311 Criminal Procedure Code 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."

6. It is a well settled law that an application under Section 311 Cr.P.C. must not be allowed only to fill lacuna in the case of prosecution, or the defence or to disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the opposite party. Additional evidence must not be received as a disguise for retrial or to change the nature of the case against the parties.

7. In case of **V.N. Patil vs. K. Niranjana Kumar and Ors., (2021) 3 SCC 661**, the aim of every court is to discover the truth. Section 311 Cr.P.C. is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power

vested under section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

8. In **Zahira Habibullah Sheikh and Ors. v. State of Gujarat and Ors., (2006) 3 SCC 374**, the Supreme Court of India observed “each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society. From above it can be safely said that it is the duty of court to ensure that such fairness is not hampered or threatened in any manner. It is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. It is cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact and points on issue. But it is left either for the prosecution or for the defence to establish its respective cases by adding the best available evidence and the court is empowered under the provision of the code to compel either the prosecution witness on their sides. Where a person is essentially a witness for the prosecution and the prosecution should have cited him either the charge sheeted or immediately afterwards but failed to do so, the failure of the prosecution to call him as a witness cannot be made up by the court, exercising its power under this Section.

9. In **State of Haryana vs. Ram Mehar and others, 2016 (4) RCR (Criminal) 154**, the matter in question before the Apex Court was that whether an application for recall of some prosecution witness for cross-examination moved by the accused on the grounds that counsel engaged earlier by defence had not put certain questions and had not given certain suggestion be allowed. The Hon'ble Supreme Court categorically held that such kind of application cannot be allowed because the accused persons had engaged counsel of their choice. In such a situation

recalling of a witness indubitably cannot form the foundation. It was further held that it has normally to be presumed that counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant.

9. Although the court can examine a witness at the instance of prosecution or defence, still, when the prosecution asks the court examine him because it could not examine him, though it had intended to do so, that should be no ground for the court to exercise its discretion under this section.

10. From perusal of file, it is evident that on March 13, 2020, five prosecution witnesses were examined and Usman was Examined as PW5 among these prosecution witnesses. The defence counsel conducted a thorough cross-examination of him that lasted more than two pages. The accused would not have the right to continue cross-examining the witnesses who have already been examined if they simply change the counsel. Cross-examination of any prosecution witnesses would never stop if such motions were granted and the accused continued to switch counsel on a regular basis. It seems that the application under Section 311 Cr.P.C. was filed in order to drag out the trial and subject the complainant to needless stress.

11. In view of the discussions made hereinabove, this Court is of the view that the impugned order dated 23.09.2021 is a well reasoned and a speaking order which needs no interference of this court. Accordingly, the same is upheld .

12. Hence, the present petition is dismissed being devoid of any merits.

13. Pending criminal application, if any shall also disposed off.

(SANDEEP MOUDGIL)
JUDGE

01.08.2024

Sham

Whether speaking/reasoned *Yes/No*
Whether reportable *Yes/No*