



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

CRM-M-45062-2024

Date of Decision: September 27, 2024

GURDEEP SINGH

....Petitioner(s)

VERSUS

JASPAL SINGH AND ANOTHER

....Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. G.S. Punia, Senior Advocate with
Ms. Manleen Kaur, Advocate
for the petitioner.

SANDEEP MOUDGIL, J.(ORAL)

1. The instant petition has been preferred under section 528 of the BNSS,2023 seeking quashing of the order dated 16.07.2024 (Annexure P-1) passed in the Criminal Complaint No. 36523 of 2013 under section 420, 467, 468, 471, 364, 365, 506, 120-B IPC, 1860 whereby the pre-charge evidence of the petitioner has been closed, ignoring the order as passed by this court in CRM-M-17855-2019, that was disposed of along with CRM-M-14993-2019 vide order dated 22.02.2024 and with the prayer to grant opportunity to produce CW-1 namely Gurdeep Singh for cross- examination as he was examined-in chief on 12.03.2019.

2. Mr. Damanjit Singh Sandhu, Advocate puts in appearance on behalf of respondents and filed his power of attorney in court, the same is taken on record.

3. This court after hearing the arguments at length, during the course of the hearing had not opined, the order dated 25.02.2019 to be null and void, as it was merely a consequence of and subsequent to the order



dated 16.01.2019 passed by the trial court and the same was quashed by the order dated 22.02.2024. The Id. Counsel of the respondent submits that he has no objection if opportunity for the cross-examination of the CW-1 namely Gurdeep Singh, may be given.

4. The Apex Court in the case as titled “**Mohanlal Shamji Soni v. Union of India**” 1991(3) RCR (Criminal) 182 held as under:

“17. The law is clearly expounded in the case of Jamatraj Kewalji Govani, (AIR 1968 Supreme Court 178) (referred to above) wherein Hidayatullah, J. as he then was, while speaking for the Bench about the unfettered discretionary power of the Court as envisaged under Section 540 of the Code has stated thus (at pp. 182-83) :

"It is difficult to limit the power under our Code to cases which involve something arising ex-improvisé which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides... It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.”

18. The next important question is whether Section 540 gives the court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though



Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

5. The Apex court further elucidated the principle laid in the case of **Mohanlal Shamji Soni** (Supra) in the case of “**State of Haryana v. Ram Mehar**” 2016(4) RCR Criminal 154 wherein it was held as under:

“25. Having dwelled upon the concept of fair trial we may now proceed to the principles laid down in the precedents of this Court, applicability of the same to a fact situation and duty of the court under Section 311 Cr.P.C. The said provision reads as follows:-

"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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case."



26. A quarter of a century back, a two-Judge Bench in ***Mohanlal Shamji Soni v. Union of India and another, 1991(3) RCR (Criminal) 182 : AIR 1991 Supreme Court 1346*** has held that:

"Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old section. This section is manifestly in two parts. Whereas the word used in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it 'at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,

- (1) to summon any person as a witness, or
- (2) to examine any person in attendance, though not summoned as a witness, or
- (3) to recall and re-examine any person already examined.

8. The second part which is mandatory imposes an obligation on the court -

- (1) to summon and examine, or
- (2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."

[Emphasis added]



The aforesaid passages make it abundantly clear about the broad applicability of the provision and the role of the court in two distinct situations.

27. In the said authority the Court referred to the earlier pronouncements in **Rameshwar Dayal and others v. State of Uttar Pradesh, (1978) 2 SCC 518, State of West Bengal v. Tulsidas Mundhra, (1963) 2 SCJ 204, Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 Supreme Court 178** and proceeded to opine that:-

"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 re-examine 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."

[Emphasis supplied]

It is important to note here in the said case, it was also observed that:-

"Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the



disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties".

[Underlining is by us]

28. In **Rajendra Prasad v. Narcotic Cell, 1999(3) RCR (Criminal) 440 : (1999) 6 SCC 110** occasion arose to appreciate the principles stated in *Mohanlal Shamji Soni (supra)*. The two-Judge Bench took note of the observations made in the said case which was to the effect that while exercising the power under Section 311 of Cr.P.C., the court shall not use such power "for filling up the lacuna left by the prosecution". Explaining the said observation Thomas, J. speaking for the Court observed:-

"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 added]

After so stating the two-Judge bench referred to the exigencies of the situation and the ample power of the court as has been laid in *Mohanlal Shamji Soni (supra)* and further referred to the authority in *Jamatraj Kewalji Govani (supra)* and opined thus:-

"We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is



plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."

[Emphasis supplied]

29. The aforesaid decision has to be appropriately understood. It reiterates the principle stated in Mohanlal Shamji Soni's case. It has only explained the sphere of lacuna by elaborating the same which has taken place due to oversight and non-production of material evidence due to inadvertence. It is significant to note that it has also reiterated the principle that such evidence is necessary for a just decision by the Court."

6. Therefore, taking into consideration the judgments of the Apex Court, this court is of the view that under section 311 Cr.P.C. the trial court has ample power to summon, recall or re-examine any person or examine any person in attendance though not summoned as witness at any stage. Though this power of the court is limited, not to be used to fill up *lacuna* if any, as left by the prosecution or by the defence. However, wherein insofar as recalling or re-examination of any person already examined is concerned, the court is bound to ensure and consider that such recall and re-examination of any person, shall appear to be essential for a just decision of the case, in the considered view of this court.

7. Further, the paramount requirement for consideration, is a just decision and for that purpose the essentiality of the person to be recalled and re-examined has to be ascertained. This court is also conscious of the fact that while such a widest power is vested with the court, exercise of such power should be made judicially and also with extreme care and caution.



8. In view of the discussions made herein above and also the statements made by the learned counsel for the respondents, this court for the furtherance of justice allows the cross- examination of CW-1 namely Gurdeep Singh.

9. Hence, the trial court is hereby directed to provide two effective opportunities for the cross-examination of the CW-1 Gurdeep Singh as he was examined in chief on 12.03.2019.

10. The present petition is accordingly allowed and the order dated 16.07.2024 (Annexure P-1) is quashed.

(SANDEEP MOUDGIL)
JUDGE

27.09.2024
Sangeeta

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