

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

**CRM-M-54870-2018(O & M)
Date of decision: 06.11.2024**

KRISHAN SHARMA

...PETITIONER

V/S

STATE OF HARYANA AND ANOTHER

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Ms. Kulwinder Pal Kaur Gill, Advocate for
Mr. M.R. Sharma, Advocate
for the petitioner.

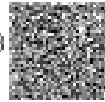
Mr. Vikas Bhardwaj, AAG, Haryana.

Dr. Anmol Rattan Sidhu, Senior Advocate
with Mr. Shiv Kumar Sharma, Advocate
for respondent No.2.

HARPREET SINGH BRAR, J. (ORAL)

1. The present petition has been filed under Section 482 Cr.P.C. for setting aside the order dated 16.11.2018 (Annexure P-5) passed by the learned Additional Sessions Judge, Kaithal in case bearing FIR No.192 dated 21.12.2017 under Sections 365, 376, 506 of IPC and Section 6 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter the 'POCSO Act'), registered at Police Station Sadar, Kaithal, vide which the application for recalling the prosecution witnesses-PW1 and PW2, filed by the petitioner under Section 311 of Cr.P.C. has been illegally dismissed.

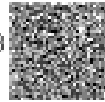
2. Learned counsel for the petitioner *inter alia* contends that at the time of recording of the statements of petitioner (complainant) and his daughter (victim/prosecutrix) as PW-2 and PW-1 respectively, respondent No.2 threatened them with dire consequences if they testify against him.



Consequently, on 17.04.2018, when the petitioner and his daughter were examined in the Court as PW-2 and PW-1 respectively, they did not support the version of the prosecution, due to which they were declared hostile by the learned Public Prosecutor. However, in spite of the fact that the petitioner and his daughter did not testify against him, respondent No.2 continued to threaten them. Consequently, the petitioner filed an application under Section 311 Cr.P.C. seeking himself and his daughter-victim to be recalled as PW-2 and PW-1, respectively as the same is essential for the right outcome of the trial. The factual matrix satisfies the parameters of Section 311 of Cr.P.C. Therefore, any denial of the opportunity to the petitioner to produce the best evidence to prove their case, would amount to a violation of Article 21 of the Constitution of India as it violates their right to a free and fair trial. However, learned trial Court has erred in dismissing the said application, as it failed to recognise that their re-calling is essential to fair adjudication of the case.

3. Learned Senior counsel for respondent No.2 submits that there is a delay of more than 02 months in moving the application under Section 311 Cr.P.C. as the respective testimonies of petitioner and his daughter as prosecution witnesses were recorded on 17.04.2008. During this period, the petitioner did not report the matter of the alleged intimidation to the police or any other authority. Moreover, the testimonies of the petitioner(PW-2) and his daughter(PW-1) were recorded on oath. As such, learned trial Court has rightly rejected the said application as the same has been filed merely to fill the lacunae in the prosecution case.

4. *Per contra*, the learned State counsel submits that the petitioner has filed the application under Section 311 Cr.P.C. merely to delay the trial and learned Court below has rightly dismissed the said application.



5. Having heard learned counsel for the parties and after perusing the records, this Court finds no force in the arguments advanced by learned counsel for the petitioner. The FIR (supra) was registered in the year 2017. Upon the commencement of the trial, the testimonies of the petitioner (PW-2) and his daughter (PW-1) were recorded wherein they contradicted the case of the prosecution. Accordingly, they were declared hostile by the learned Public Prosecutor. Subsequently, however, the petitioner moved an application under Section 311 Cr.P.C. on 25.07.2018 seeking to be recalled as a witness along with his daughter. It is pertinent to note that the said application was moved after 02 months of recording of their depositions as PW-2 and PW-1, respectively.

6. For just adjudication of the matter at hand, a study of Section 311 of Cr.P.C. and Section 138 of the Indian Evidence Act (hereinafter the 'Evidence Act') are warranted. The same are reproduced below:

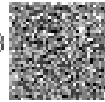
Section 311: Power to summon material witness, or examine person present.

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.

Section 138: Order of examinations. *Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. — *The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court,*



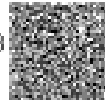
introduced in re-examination, the adverse party may further cross-examine upon that matter.

7. Section 311 of Cr.P.C. empowers the Court to recall and re-examine a witness or summon a person not originally summoned as a witness, at any stage of inquiry, trial, or proceeding. This discretionary power vested with the Court should be used with caution and prudence and only when compelling and legitimate reasons are indicated. A witness cannot be recall in an automatic, mechanical manner. Such action should only be taken when recalling is necessary to arrive at a just decision. A two judge Bench of the Hon'ble Supreme Court in **V.N. Patil vs. K. Niranjan (2021) 3 SCC 611** examined the scope of Section 311 of Cr.P.C and the following was observed:-

“15. 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.”

Further, a Division Bench of this Court in **Sukhdev Singh vs. State of Punjab, 1982 Cr. LJ 2201** opined as follows:-

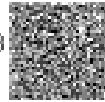
“10. ...The discretion is required to be exercised by the Court keeping in view the just decision of the case unmindful of the fact whether any party before it gains or losses from the exercise of such discretion under this section. There is no doubt that object of the section is not to enable any one 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".

8. In the present case, the petitioner (PW-2) and his daughter, the victim(PW-1) claim that they were being threatened by respondent No.2-accused. It was only because of apprehension of harm at the hands of respondent No.2 that they could not narrate the true version of the alleged incident on 17.04.2018, which resulted in them being declared hostile. Curiously, in the span of two months before moving an application under Section 311 Cr.P.C., the petitioner did not make any efforts to report the instances of coercion and harassment caused by respondent No.2 to the police or any other authority. Further still, the facts of the case are squarely covered by the judgment rendered by a three Judge Bench of the Hon'ble Supreme Court in ***Rajaram Prasad Yadav vs. State of Bihar and another 2013(14) SCC 461***, wherein speaking through Justice Fakkir Mohamed Ibrahim Kalifulla, the following was observed:

*"29. ...We do not find any bona fides in the application of the second respondent, while seeking the permission of the Court under Section [311](#) Criminal Procedure Code for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No. 78/2007, seem to have weighed with the second respondent to come forward with the present application under Section [311](#) Criminal Procedure Code, by way of an afterthought. **If really there was a threat to his life at the instance of the appellant and the other accused, as rightly***

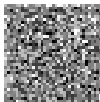


noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 Criminal Procedure Code. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court...

Reliance in this regard can further be placed on the judgment of the Hon'ble Apex Court in ***Ratanlal vs. Prahlad Jat and others 2017(9) SCC 340.***

9. It is trite law that firstly examination-in-chief of the witness is conducted, which is followed by his cross-examination. It is only after the conclusion of his cross-examination that the possibility to re-examine him arises. Re-examination is done at the instance of the prosecution, when it seeks to clarify any ambiguities or doubts that creep in at the time of examining the witness. The failure to provide adequate clarification at this stage would grant benefit of the doubt to the defence, as held by the Hon'ble Supreme Court in ***Ramsewak vs. State of M.P. (2004) 11 SCC 259.*** Section 138 of the Evidence Act stipulates that the purpose of re-examination is to address any inconsistencies between statements made during examination-in-chief and cross-examination, explain any unintentional remarks made during cross-examination, or resolve any ambiguities or doubts introduced by the cross-examination. However, when there is no ambiguity or need for clarification, questions intended merely to neutralise the impact of any previous statements.

The Hon'ble Supreme Court in ***Pannayar vs. State of Tamil Nadu (2009) 9***



SCC 152 has opined that the scope of Section 138 Evidence Act is limited to seeking clarification of doubts that arose during cross-examination and does not envisage introduction of new facts in order to supplement examination-in-chief or cross-examination. However, if new facts are required to be introduced at this stage, the permission of the Court must be sought as held in *Rammi vs. State of M.P. (1999) 8 SCC 649*. However, no such permission as sought in the case at hand.

10. This Court cannot be expected to direct recalling of the petitioner (PW-2) and his daughter-victim (PW-1) merely at their *ipse dixit*. It appears that the application under Section 311 of Cr.P.C. was moved merely as a dilatory tactic. Moreover, learned counsel for the petitioner has been unable to indicate any inconsistencies in the deposition of petitioner (PW-2) and his daughter (PW-1) which require clarification. A whole new version of events cannot be allowed to be introduced by recalling witnesses in terms of Section 138, Evidence Act. Therefore, this Court is of the considered opinion that recourse to Section 311 Cr.P.C. or Section 138 Evidence Act is not essential for just adjudication of the matter at hand.

11. Accordingly, present petition stands dismissed being devoid of any merit. Pending miscellaneous application(s), if any, also stand(s) disposed of.

November 06, 2024
manisha

(HARPREET SINGH BRAR)
JUDGE

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|------|---------------------------|--------|
| (i) | Whether speaking/reasoned | Yes/No |
| (ii) | Whether reportable | Yes/No |