

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

CRR-5818-2018

Reserved on: 09.01.2025

Pronounced on: 14.01.2025

Labh Singh and another

...Petitioners

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. S.S. Momi, Advocate
for the petitioners.

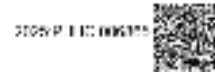
Ms. Geeta Sharma, DAG Haryana.

Mr. A.S. Virk, Advocate
for respondent No.2.

HARPREET SINGH BRAR, J.

1. The present revision petition is preferred against judgment dated 05.12.2018 passed by learned Additional Sessions Judge, Kurukshetra whereby appeal against judgment of acquittal dated 20.12.2016 passed by learned Judicial Magistrate 1st Class, Pehowa in FIR, bearing No. 342 dated 19.09.2014 registered under Sections 323, 506, 34 of IPC, at Police Station Pehowa, Kurukshetra, was allowed.

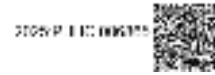
2. Briefly, the facts are that the FIR (supra) was registered against the petitioners under Sections 323, 506, 34 IPC. After the conclusion of investigation, Final Report under Section 173 of Cr.P.C. was presented before the trial Court. After supplying the copy of the Final Report, charges under Sections 452, 323, 506 read with Section 34 of IPC were framed against the petitioners to which they pleaded not guilty and claimed trial. After scrutinising the evidence adduced by the prosecution and hearing the counsel for the parties, the learned trial Court



acquitted the petitioners vide judgment dated 20.12.2016 on the grounds that despite availing numerous opportunities, the prosecution failed to examine the complainant. In appeal filed by the complainant, an application under Section 311 read with Section 391 Cr.P.C. was filed for directions to examine the complainant. Vide the impugned judgment dated 05.12.2018 passed by the learned Additional Sessions Judge, Kurukshetra the appeal was allowed and the matter was remanded back to the learned trial Court with directions to examine the complainant and then decide the case afresh.

3. Learned counsel for the petitioners, *inter-alia*, contended that the complainant-respondent No.2, despite being represented by a counsel, intentionally failed to appear before the learned trial Court in order to protract the proceedings. Further, the observations of the learned lower Appellate Court that no efforts were made by the learned trial Court to secure the presence of the complainant is completely arbitrary and illegal since the complainant was well aware of the pendency of the case. This is proved by the fact that the complainant engaged a counsel immediately on the day charges were framed against the petitioners.

4. *Per contra*, learned counsel for respondent No.2-complainant averred that the learned lower Appellate Court rightly passed the impugned judgment dated 05.12.2018. On 20.12.2016, the complainant appeared before the learned trial Court as substantiated from his attendance marked in the register of Naib Court, yet, the learned trial Court closed the prosecution evidence without examining him. On the same day, an application under Section 311 Cr.P.C. for recalling of remaining witnesses was moved by the prosecution which was also wrongly dismissed by the trial Court. As such, the impugned judgment has been passed by

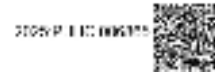


record in accordance with the law and therefore, no interference is warranted by this Court.

5. Having heard the learned counsel for the parties and after perusing the record of the case with their able assistance, this Court finds it apposite to reproduce the findings of the learned lower Appellate Court:

“Although the complainant is at fault by not appearing in the court despite being represented by his counsel and the counsel for the complainant is also at fault for not procuring his presence and examining him as the witness of the prosecution and his sole purpose was not to just get his attendance marked but was also duty bound to assist the Public Prosecutor as well as the Court in securing the presence of the appellant/complainant who was the star witness of the prosecution. Speedy trial as a right to the accused cannot be granted by the court by overlooking the procedure to be adopted by the Court and orders cannot be passed in a haste without ignoring the procedure and process adopted by the Court for securing the presence of the witnesses. The learned trial court never looked into the fact that the counsel for the appellant/complainant was appearing in the court on each and every date of hearing but it did not direct him to produce the appellant/complainant for which the appellant/complainant cannot be made to suffer and he has to be given an opportunity to appear and depose as a witness of the prosecution.”

6. Interestingly, although, the learned lower Appellate Court conceded that respondent No.2-complainant was at fault for not appearing before the learned trial Court despite being represented by his counsel, it proceeded to remand the case back to the trial Court to examine the complainant and then decide the case afresh. A record of the proceedings reveals that the counsel for the complainant filed his power of attorney on 16.02.2016. Subsequently, summons were issued to the complainant for 23.03.2016, 04.05.2016, and 02.08.2016, which were returned unserved, with the last report stating that no such employee was working at the Municipal Committee, Pehowa. While summons for 23.08.2016 were duly served, the complainant failed to appear, prompting the issuance ofailable warrants for



warrants were subsequently issued for 20.12.2016, however, these too could not be executed. This coupled with the fact that the complainant immediately engaged a counsel on the day charges were framed against the petitioners and the said counsel attended all the hearings of the case, begs the inference that the complainant was cognizant of the dates of the case and deliberately chose to absent himself from the proceedings.

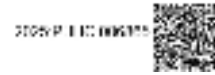
7. A Division Bench of this Court in ***State vs. Kali Ram Nand Lal A.I.R. 1968 Punjab and Haryana 87*** held:

“The duty to summon the witnesses in the course of the trial is that of the Magistrate or the Court concerned. I do not find anything in Section 251-A or in any other provision under the Criminal Procedure Code which debars the Magistrate from summoning the prosecution witnesses or enforcing their attendance if they refuse to appear on the date fixed for their evidence despite the fact that the prosecution had directed them to attend the Court on that day.

This, however, does not mean that the Magistrate conducting the trial under Section 251-A of the Criminal Procedure Code must go on adjourning the trial till it suits the convenience of the prosecution to produce its evidence. Whether or not the Magistrate will proceed to enforce the attendance of the witnesses for the prosecution and grant adjournment for that purpose would depend upon the facts and circumstances of each case. Though it is true that the Magistrate should not be in a hurry to close the prosecution evidence, yet at the same time the Magistrate must be vigilant enough to see that the process of the Court is not abused by the prosecution obtaining unnecessary adjournments resulting in harassment of the accused.”

Moreover, a Co-ordinate Bench of this Court in ***Rishi Parkash vs. State of Haryana 1985(1) R.C.R. (Crl.) 336*** observed as follows:

“4. So far as the first point is concerned, it is patent from the record that the prosecution was given a number of opportunities to produce its evidence and then that last opportunity was given to it on 2.3.1982. Evidence was to be examined on 30.4. 1982. On that day, the prosecution did not examine its remaining evidence. The Court was thus constrained to close evidence. No fault could thus be found at the conduct of the Magistrate in closing the prosecution case. It is besides



the point whether material evidence by the prosecution had been left out or not. The Court has otherwise inherent powers to call a witness as a Court witness to elicit information from him pertaining to the case. That power can even be exercised at the appellate state. Thus, on the first point no necessity arose for the case to be remanded for fresh trial. The learned Sessions Judge was in error.”

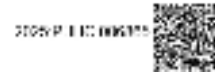
8. Further, the reliance on Section 391 of Cr.P.C. would also not come to the aid of the complainant in the present case since this Court is unsatisfied as to why the additional evidence being sought to be introduced at the appellate stage could not have been led at the appropriate stage during trial. The complainant cannot be allowed to take shelter of Section 391 Cr.P.C. especially when there is wilful default on his part.

9. Recently, two Judge bench of the Hon’ble Supreme Court in ***Ajitsinh Chehuji Rathod v. State of Gujrat and another Criminal Appeal @SLP(Crl.) No.16641 of 2023*** decided on 29.01.2024, speaking through Justice Sandeep Mehta, has held as follows:

“9. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that nonrecording of such evidence may lead to failure of justice.”

The Himachal Pradesh High Court in ***Kewal Krishan v. State of H.P. and another 2023(2) Cri.CC 455***, speaking through Justice J.R. Dua has opined as follows:

“4(ii) In (2019) 16 SCC 712 [Brigadier Sukhjeet Singh (Retired) MVC v. State of Uttar Pradesh & Ors], the Hon'ble Apex Court held that the key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. Power to take



additional evidence under Section 391 Cr.P.C. is with the object of appropriate decision of the appeal by the appellate Court to secure ends of justice. The Hon'ble Apex Court noted the decision rendered in (2001) 4 SCC 759 (Rambhau v. State of Maharashtra), wherein a word of caution was introduced for guidance "that additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a re-trial or to change the nature of the case against the accused. The order for adducing additional evidence must not ordinarily be made, if the prosecution has had a fair opportunity and has not availed of it. It was further held that there is no fetter on the power under Section 391 Cr.P.C of the Appellate Court. All powers are conferred on the Court to secure the ends of justice. While allowing the application moved under Section 391 Cr.P.C. by the accused in that case, Hon'ble Apex Court further held that it depends on facts of each and every case to come to a conclusion as to whether it is necessary to take additional evidence or not." (emphasis added)

Further, the Himachal Pradesh High Court in ***Jagdeep Kumar v. Himachal Pradesh State Co-operative Bank Limited 2019 (3) SLC 1354***, speaking through Justice Vikas Singh Thakur, has observed as follows:

"14. From the provisions of Section 391 Cr.P.C., 1973 and ratio of law laid down by the Apex Court, it emerges that Section 391(1) Cr.P.C., 1973 empowers the Appellate Court, dealing with any appeal under Chapter XXIX of Cr.P.C. either to take evidence itself or direct it to be taken by the Courts subordinate to it, but after recording the reasons, if it thinks that additional evidence is necessary. Undoubtedly, the Courts are there for dispensation of justice and necessary reasons for taking additional evidence at appellate stage must be in the interest of justice and for a just and proper decision of the Appellate Court, as not only the primary, but sole purpose of judicial machinery, is to impart justice. Therefore, provisions of this Section should be invoked only for the ends of justice and not for any other reason. This Section is also not intended to remedy the negligence or laches of the party. It is also settled that though power is unfettered, but the recourse to exercise of these powers are not to be made ordinarily in a situation where either of the parties did not avail the opportunity to adduce evidence and accused should not be allowed to adduce the defence evidence at appellate stage, where he has failed to adduce the evidence despite granting of several opportunities. Appellate Court should not admit additional evidence where the party had opportunity to file the same before the trial



Court, unless the requirement of justice dictates otherwise.”
(emphasis added).

10. In view of the discussion above, this Court finds that the learned trial Court rightly acquitted the petitioners after giving ample opportunity to the prosecution to lead evidence. As such, there is merit in the present revision petition and the same is allowed. Accordingly, the impugned judgment dated 05.12.2018 passed by learned Additional Sessions Judge, Kurukshetra is set aside.

11. Pending miscellaneous application(s), if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

14.01.2025
Ajay Goswami

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No