

(2020) 02 P&H CK 0123

In the Punjab And Haryana At Chandigarh

Case No : Criminal Main No. 45933 Of 2018(O&M

Sanjay

APPELLANT

Vs

State Of Haryana And Others

RESPONDENT

Date of Decision : 06-02-2020

Acts Referred:

Code Of Criminal Procedure 1973 — Section 311, 482
Indian Penal Code, 1860 — Section 34, 120B, 201, 302
Arms Act, 1959 — Section 25
Evidence Act, 1872 — Section 138

Citation : (2020) 02 P&H CK 0123

Hon'ble Judges : Lalit Batra, J

Bench : Single Bench

Advocate : Deepender Singh, Arun Beniwal, Parshant Singh Chauhan

Final Decision : Allowed

Judgement

Lalit Batra, J

1. This petition under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) has been filed by petitioner-Sanjay

(complainant) for quashing of order dated 13.09.2018 (Annexure P-2) rendered by trial Court, in terms of which, application moved by petitioner

through Public Prosecutor under Section 311 Cr.P.C. for permitting prosecution to examine Vishal son of Sanjay as additional prosecution witness in

case titled "State Vs. Dharambir and others", FIR No.770 dated 20.09.2015 under Sections 120-B, 201 and 302 IPC read with Section 34 IPC

and 25 of Arms Act, Police Station Civil Lines, Gurugram, has been dismissed and consequently prayer to allow said application dated 03.08.2018

(Annexure P-1) under Section 311 Cr.P.C. has been made.

2. Application under Section 311 Cr.P.C. (Annexure P-1) was moved by petitioner (complainant) through Public Prosecutor before the trial Court with the averments that during the course of investigation of case FIR No.770 dated 20.09.2015, as detailed above, besides other evidence, supplementary statement (Ex.DC) of PW-8 Sanjay was recorded on 25.09.2015, wherein said Sanjay had categorically narrated that about one and half months prior to the murder of Mohit, an altercation had taken place between Mohit (since deceased) and accused Dharambir, wherein initially Dharambir had slapped Vishal and then in the presence of Mohit (since deceased), Rohit and Arun, above said Vishal had slapped accused Dharambir. At that time, Mohit and Monu, cousin brothers of accused Dharambir and their servants namely Sachin and Raju were accompanying accused Dharambir. Accused Dharambir had proclaimed before Mohit (since deceased) that they had slapped â??Thakurâ? and they have to face consequences. Sanjay (complainant) had further narrated in his supplementary statement that he had every reason to say that accused Dharambir had active role in the commission of murder of his nephew Mohit and since the day of murder of Mohit, accused Dharambir along with his companions was at large. It is further averred that above said version was reiterated by PW-8 Sanjay, when he appeared in the Court as prosecution witness. In view of supplementary statement of Sanjay (complainant), it was incumbent upon the Investigating Officer to join above said Vishal son of Sanjay during investigation and to record his statement but for the reasons best known to the Investigating Officer, no such effort was made at his instance. It is cardinal principle of evidence that the best available evidence should be brought before the Court. Statement of Vishal son of Sanjay as prosecution witness is quite crucial to the cause of prosecution and it is an important link in the chain of circumstances. Thus, it has been prayed that Vishal son of Sanjay be cited as prosecution witness and he may be called and examined as prosecution witness for the ends of justice, fair play and just decision of the case.

3. Even though respondent No.1-State has filed reply to instant petition wherein prayer for dismissal of petition has been made, however, when confronted with above said reply, learned State counsel has emphatically submitted that application in question moved under Section 311 Cr.P.C.

presented by petitioner (complainant) before the trial Court, it was well supported by the Public Prosecutor and in this scenario reply dated 20.01.2019

filed in this Court at the instance of respondent-State and that too resisting the cause of petitioner (complainant), said reply appears to have been filed

due to some mistake and it may not be read for the purpose of this petition.

4. On notice, reply has been filed at the instance of respondents \ No.2 to 6, wherein it is contended that the petitioner (complainant) cannot be

permitted to improve his case at this juncture as all the material prosecution witnesses have already been examined. As a matter of fact, FIR was

registered on 20.09.2015, supplementary statement, as per application under Section 311 Cr.P.C., was rendered on 25.09.2015 and after investigation,

challan was prepared on 06.01.2016, whereas instant application under Section 311 Cr.P.C. was moved on 03.08.2018 and that too after examination

of PW-8 Sanjay (complainant) and with a clear object to introduce/ fill up the lacuna of motive which otherwise lacks in the entire prosecution story

and it cannot be permitted at all. In this manner, prayer for dismissal of application has been made.

5. Learned counsel for the parties have been heard.

6. While having due regard to the contentions of respective parties, it is observed that in terms of instant application moved under Section 311 Cr.P.C.,

petitioner (complainant) duly assisted by respondent-State wants to summon and examine witness namely Vishal son of Sanjay. It is the case of

petitioner (complainant) that in order to complete the chain of events especially motive on the part of accused Dharambir to commit the offence in

question, said aspect is to be brought on record in the manner that above said Vishal son of Sanjay was witness to the alleged incident, which took

place about one and half months prior to the incident dated 19.09.2015. Learned counsel for the petitioner (complainant) has specifically pointed out

that petitioner-Sanjay Â (complainant) when appeared in Court as prosecution witness (PW-8), he has categorically narrated the incident, which took

place about one and half months prior to the murder of Mohit and that incident was disclosed to him (Sanjay) by Vishal son of Sanjay on 24.09.2015

and further said incident was well narrated by Sanjay (PW-8) in his supplementary statement recorded on 25.09.2015 (Ex.DC) by the Investigating

Officer. Learned counsel for the petitioner (complainant) has emphatically

contended that previous incident as disclosed by Vishal son of Sanjay to petitioner-Sanjay (complainant) on 24.09.2015 and further disclosure of said fact by petitioner-Sanjay (complainant) to the Investigating Officer, vide his supplementary statement dated 25.09.2015, said circumstance cannot be termed as after thought version so as to fill up lacuna in the prosecution version but as a matter of fact said aspect is a material fact for the just decision of the case.

7. It is settled law that a lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as in the inherent weakness or a latent wedge in the matrix of the prosecution case. To this effect, reliance can be placed upon ruling *â??Rajendra Prasad Versus The Narcotic Cell through its Officer-in charge Delhiâ??* (1999) SCC (Cri) 1062.

8. In the above said ruling, while dealing with provisions of Section 311 Cr.P.C., Honâ??ble Supreme Court further observed that no party in a trial can be fore-closed 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. To this effect, reliance can also be placed upon ruling of this Court *â??Janeshwar Dutt Versus Sanjiv Kumarâ??* 2007 (2) R.C.R. (Criminal) 628 (P&H), wherein it was held that while deciding the application under Section 311 Cr.P.C., a Court is required to make a distinction between the error and lacuna and to determine whether the production of some evidence or material should be brought on evidence taking into consideration whether it is necessary for the just decision of the case.

9. Section 311 Cr.P.C. provides that 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 be essential to the just decision of the case.

10. In case *â??Hanuman Ram Versus The State of Rajasthan and others* 2008 (4) RCR (Criminal) 82,3 Honâ??ble Supreme Court has laid down

the object underlying Section 311 Cr.P.C. which reads as under:-

â??The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the

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 Section is not limited only for the benefit of the accused, and it will not be an improper exercise of the

powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the

accused. The Section is a general Section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue

summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 Cr.P.C., the significant expression that occurs is â??at any

stage of inquiry or trial or other proceeding under this Codeâ?. It is, however, to be borne in mind that whereas the Section confers a very wide power

on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for

application of judicial mindâ?.

To this effect reliance can also be placed upon ruling *â??Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd.* 2008 (11) SCC 108.

11. Hon'ble Supreme Court in case of *â??Raja Ram Prasad Yadav v. State of Bihar and another* reported in AIR 2013 SC 3081, while taking note

of various judgments dealing with an application under Section 311 Cr.P.C. has enumerated the following principles which are required to be borne in

mind by the Courts while deciding an application under Section 311 Cr.P.C. which reads as under:-

â??23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section

138 of the Evidence Act, we feel the following principles will have to be borne in

mind by the Courts:

a) 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?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. 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.

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

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

g) 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.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) 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.

j) 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C. 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.â??

12. Section 311 Cr.P.C. gives wide powers to the Court to summon a witness or re-examine a witness who has already been examined and the word

'any' which has been used as a pre-fix would also include a person who is not cited as a witness. The paramount requirement is just decision and for

that purpose an additional person can be summoned while invoking provisions of Section 311 Cr. P. C. To this effect reliance can also be placed upon

ruling of this Court â??Vinod Kumar Vs. State of Punjabâ?? 2016 (4) R.C.R. (Criminal) 683 (P&H).

13. I have considered the facts and circumstances of this case. A perusal of supplementary statement of Sanjay (petitioner-complainant) (Annexure

P-6/Ex.DC) rendered on 25.09.2015 at the time of investigation stage and his (Sanjay) testimony recorded in the Court as PW-8 on 10.07.2018 and

13.07.2018 (Annexure P-7) (colly) make it clear that it was an oversight on the part of Prosecution Agency to get the incident which allegedly took

place one and half months prior to the occurrence dated 19.09.2015 bring on record. It is not a case where the petitioner (complainant) was making an

attempt to fill up the lacuna in the prosecution case but it was merely a fall out of an oversight committed by the Prosecution Agency conducting the case.

14. Keeping in view above said guidelines, it is held that in a given set of facts, as a fair chance has to be given to petitioner (complainant) assisted by

respondent-State to prove its case and, thus, to arrive at the truth, which is the only object and guideline while exercising the powers under Section 311

Cr.P.C., incorporation of name of Vishal son of Sanjay in the list of prosecution witnesses and examination of said Vishal as prosecution witness,

appears to be essential for the just decision of the case. Impugned order dated 13.09.2018 (Annexure P-2) dismissing the application under Section

311 Cr.P.C., if seen in the context to the spirit of Section 311 Cr.P.C., is not sustainable.

15. As a sequel to above, instant petition is allowed and the impugned order dated 13.09.2018 (Annexure P-2) passed by trial Court thereby dismissing

the application moved by petitioner (complainant) through Public Prosecutor under Section 311 Cr.P.C. for permitting prosecution to examine Vishal

son of Sanjay as prosecution witness, is hereby set aside. Resultantly, application under Section 311 Cr.P.C. dated 03.08.2018 (Annexure P-1) moved

by petitioner (complainant) through Public Prosecutor deserves to be allowed. The matter is remitted back to the trial Court to incorporate the name of

Vishal son of Sanjay in the list of prosecution witnesses and to summon and examine said Vishal as prosecution witness. Since instant case FIR

pertains to the year 2015 and respondents (accused) are in custody, the trial Court shall fix a date of hearing at the earliest to call and examine witness

namely Vishal son of Sanjay and accord opportunity to the accused persons to cross-examine said witness and thereafter, proceed with the trial and

that too as expeditiously as possible.