

(2012) 03 SHI CK 0531
In the High Court Of Himachal Pradesh
Case No : Criminal MMO No. 5 of 2012

Shyam Verma

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 26-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Penal Code, 1860 (IPC) — Section 406

Citation : (2012) 03 SHI CK 0531

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : Virender Singh Chauhan, for the Appellant; Ruma Kaushik, Addl. A.G. with Mr. J.S. Rana, Asstt. A.G., for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, Judge

1. This petition has been directed against the order dated 28.12.2010 passed by Chief Judicial Magistrate, Solan in application No. 378/4 of 2010 in Criminal Case No. 50/2 of 2005 allowing application u/s 311 Cr.P.C. of the prosecution. The facts in brief are that petitioner is facing trial for offence punishable u/s 406 IPC. The prosecution has cited 11 witnesses including one Sat Pal but prosecution examined only six witnesses. The trial Court afforded several opportunities to the prosecution to produce its witnesses but despite such opportunities the prosecution could not examine more than six witnesses. The trial Court closed the evidence of the prosecution on 1.7.2010, listed the case for statement of petitioner u/s 313 Cr.P.C., which was recorded on 8.9.2010. The case was fixed for final arguments on 16.9.2010.

2. On 16.9.2010 the prosecution moved an application u/s 311 Cr.P.C. for examining Sat Pal, Surjeet Singh, Suresh Kumar, Ranjeet Singh and Madan Lal. The application was contested by the petitioner. The trial Court partly allowed the application on 28.12.2010 and permitted the prosecution to examine Sat Pal as

witness. The order dated 28.12.2010 has been assailed in the petition. It has been stated that once the order dated 1.7.2010 closing the evidence of the prosecution had attained finality, prosecution could not be granted permission u/s 311 Cr.P.C. for examining the same witness who was earlier not permitted to be examined vide order dated 1.7.2010. The submission has been made for acceptance of the petition.

3. Heard. Mr. Virender Singh Chauhan, Advocate, learned counsel for the petitioner has submitted that the trial Court has erred in allowing the prosecution to examine Sat Pal as prosecution witness vide order dated 28.12.2010. The evidence of the prosecution was closed by the trial Court on 1.7.2010 when despite several opportunities prosecution failed to examine witnesses including Sat Pal. In the teeth of the order dated 1.7.2010 the permission granted by the trial Court to the prosecution to examine Sat Pal u/s 313 Cr.P.C. vide order dated 28.12.2010 is wrong and illegal. The learned counsel for the petitioner has relied *Danday Knit Garments and Another Vs. Subiksha Spinners (P.) Ltd.*, *Keshav Choudhary and Others Vs. State of Bihar*, and *Saraswati Devi Vs. State of Jharkhand*, in support of his submission. The learned Additional Advocate General has supported the impugned order. It has been submitted that the trial Court has committed no error in allowing the prosecution to examine Sat Pal vide order dated 28.12.2010 even in the presence of the order dated 1.7.2010. The learned Additional Advocate General has relied *Raj Deo Sharma Vs. The State of Bihar*, and *Shailendra Kumar Vs. State of Bihar and Others*,

4. The Section 311 Cr.P.C. provides as under:-

"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."

5. The trial Court vide order dated 28.12.2010 exercising powers u/s 311 Cr.P.C. allowed the prosecution to examine Sat Pal, Record Keeper, D.C. Office, Solan alongwith case file No. 168/04 dated 1.9.2004 regarding the release of truck No. HP-14-4817 alongwith personal and sapurdari bonds in CMA titled as *Shyam Verma vs. State of H.P.* FIR No. 168/2004. The application of the petitioner was opposed by the petitioner in the trial Court on the ground that the trial Court is not competent to review the earlier order closing the evidence of the prosecution.

6. In *M/s Dandy Knit Garments (supra)* it has been held that after the closure of the evidence on the side of the respondent, he cannot be allowed to fill up the lacuna and it was held that trial Court was not correct in allowing the application u/s 311 Cr.P.C. In *Keshav Choudhary (supra)* the application u/s 311 Cr.P.C. was allowed. The High Court has held that there is no limitation on the power of the

Court arising from the stage from which the trial Court may have reached provided the same is of the opinion that for the just decision of the case this may be taken. In that case, it was held that the action of the prosecution as also of the police machinery can be said to be highly negligent and the prosecution singularly failed to produce any witness in spite of the non-bailable warrants of arrest issued against them. The High Court held that under those circumstances, Section 311 Cr.P.C. could not be attracted. In *Saraswati Devi (supra)* the application u/s 311 Cr.P.C. was dismissed by the trial Court as the prosecution failed to examine prosecution witnesses after about five years and the order of the trial Court was upheld by the High Court.

7. In *Raj Deo Sharma (supra)* the Central Bureau of Investigation filed a petition for clarification (and also for some modification) to the directions issued by the Supreme Court. The Supreme Court held as under:-

"We may observe that the power of the Court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the Seven-Judge Bench in *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, nor in *Kartar Singh's case (1994 Cri.L.J. 3139)*, such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court u/s 311 of the Code. We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the Court to summon and examine or recall and re-examine any such person".

8. In *Shailendra Kumar (supra)* the Supreme Court has held as follows:-

"Learned counsel for the respondent accused however submitted that in this case there is no question of referring to Section 311 Cr.P.C. in view of earlier order dated 1.2.2000 passed by the High Court setting aside the order dated 20.9.1995 passed by the Additional Sessions Judge recalling the order dated 3.9.1994 by which the prosecution evidence was declared to have been closed. This submission is without any substance. Section 311 empowers the Court to summons material witnesses though not summoned as witness and to examine or recall and re-examine if their evidence appears to it to be essential to the just decision of the case...."

9. The learned counsel for the petitioner has submitted that the evidence of the prosecution was closed on 1.7.2010 and that order attained finality. The order dated 28.12.2010 amounts to review of the order dated 1.7.2010 which is not permissible. This contention has no force. The Section 311 of the Code authorizes the Court to summon any person as a witness at any stage of the trial. This power is available to the Court even after the closure of the evidence of the prosecution. In *Shailendra Kumar (supra)* the prosecution evidence was closed by the order of the Court. The Additional Sessions Judge by order dated 20.9.1995 recalled order dated 3.9.1994 by which the prosecution evidence was

directed to be closed. He also directed the APP to produce the witnesses on the next date of hearing. The said order was challenged in the High Court. The High Court vide order dated 1.2.2000 allowed the revision application on the ground that criminal court cannot recall his earlier order. On 12.5.2000 the State filed an application u/s 311 of Code of Criminal Procedure for examining the witnesses. The application was rejected on 2.6.2000 on the ground that application has no meaning in view of the order passed by the High Court in view of the order passed by the High Court in revision application. The matter was taken in the High Court which was also dismissed on the ground that it was not proper for the High Court to interfere with the order passed by the Sessions Judge. Thereafter the matter was taken to Supreme Court. It was contended that the order dated 1.2.2000 passed by the High Court was illegal. This contention has been rejected by the Supreme Court in the judgment noticed above. The trial Court in the present case on the application u/s 311 Cr.P.C. of the State allowed examination of Sat Pal alongwith record. The discretion exercised by the trial Court cannot be said to be wrong, illegal. The petitioner will get an opportunity to cross-examine the witness. There is no merit in the petition, hence petition is dismissed. The parties through their counsel are directed to appear before the trial Court on 12.4.2012. The record be sent back immediately to the Court below so as to reach before the date fixed. Cr. M.P. No. 26 of 2012 has become infructuous in view of disposal of the main petition.