

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

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**CRM-M-13260-2021
Date of decision: 31.03.2021**

Manoj Kumar

.....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Chandan Singh Rana, Advocate
for the petitioner.

Mr. Amit Mehta, Sr. D.A.G., Punjab
for the respondent-State.

ARUN KUMAR TYAGI, J. (ORAL)

The petitioner has filed present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.") for setting aside order dated 12.03.2021 passed by learned Additional Sessions Judge (Fast Track Special Court), Ludhiana (D) vide which application under Section 311 of the Cr.P.C. filed by the petitioner, for recalling PW1-father and PW2-mother of the victim girl child, PW3-Jaswinder Kaur, Principal, Government Middle School, Budhewal, Ludhiana and PW4 (victim girl child) for their further cross-examination was dismissed.

Briefly stated, the facts of the case are that father of the victim girl child lodged FIR No.0103 dated 04.05.2019 under Section 365 of the Indian Penal Code 1860 (for short, "the IPC") with the Police Station Jamalpur, District Police Commissionerate Ludhiana alleging that his eldest daughter had been kidnapped by some unknown person and taken to some unknown place. Pursuant to registration of

FIR, the police investigated the case and recovered the victim girl child from custody of the petitioner. On completion of investigation, the petitioner was charge-sheeted to face trial under Sections 365 and 376 of the IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012. During trial statements of PW1-father and PW2-mother of the victim girl child, PW3-Jaswinder Kaur, Principal, Government Middle School, Budhewal, Ludhiana and PW4 (victim girl child) were recorded. While the case was fixed for remaining prosecution evidence, the petitioner filed application for recalling of PW1-father and PW2-mother of the victim girl child, PW3-Jaswinder Kaur, Principal, Government Middle School, Budhewal, Ludhiana and PW4 (victim girl child) for further cross-examination on the ground of change of Counsel and omission on the part of his previous Counsel to put material questions to them. The application was dismissed by learned Additional Sessions Judge (Fast Track Special Court), Ludhiana (D) vide order dated 12.03.2021 on the grounds that no new facts and circumstances were disclosed and change of Counsel was no ground to allow the application.

Feeling aggrieved, the petitioner has filed the present petition.

The petition has been opposed by the respondent-State. However, no reply has been filed by the respondent-State.

I have heard arguments addressed by learned Counsel for the petitioner and learned State Counsel and gone through the material placed on record.

At the very outset, learned Counsel for the petitioner has

submitted that the petitioner does not press the petition qua prayer for recalling of PW1-father and PW2-mother of the victim girl child and PW3-Jaswinder Kaur, Principal, Government Middle School, Budhewal, Ludhiana for their further cross-examination and the petition may be dismissed as withdrawn qua the same.

Accordingly, the petition is dismissed as withdrawn qua prayer for recalling of PW1-father and PW2-mother of the victim girl child and PW3-Jaswinder Kaur, Principal, Government Middle School, Budhewal, Ludhiana for their further cross-examination.

So far as the prayer for recalling of PW4 (victim girl child) for further cross-examination is concerned, learned Counsel for the petitioner has submitted that there are material contradictions in statement dated 06.05.2019 made under Section 161 of the Cr.P.C., statement dated 06.05.2019 made under Section 164 of the Cr.P.C. and statement dated 20.12.2019 made during trial. At the time of her cross-examination, previous Counsel for the petitioner omitted to put material questions to the victim girl child regarding the same. Recalling of victim girl child is necessary in the interest of justice for just decision of the case. Therefore, the petition may be allowed, impugned order dated 12.03.2021 may be set aside and the application under Section 311 of the Cr.P.C. may be allowed qua the prayer for recalling of PW-4 (the victim girl child).

On the other hand, learned State Counsel has submitted that the petitioner was granted opportunity for cross-examination of the victim girl child, who was cross-examined by his Counsel at length. Mere change of Counsel was no ground for recalling the victim girl

child for further cross-examination. The impugned order does not suffer from any illegality. Therefore, the petition may be dismissed.

Section 311 of the Cr.P.C. empowers the Court to summon and examine material witness or examine any person present and recall and re-examine any person already examined and the same reads 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."

In ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd. : 2008 (4) Criminal Court Cases 162 (Supreme Court)*** Hon'ble Supreme Court observed as under :-

"7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched 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 it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such

means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

8. 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 of 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 the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". 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 mind."

In Mannan Sk. and others Vs. State of West Bengal and another : 2014(4) R.C.R.(Criminal) 617 Hon'ble Supreme Court observed as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise

it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

11. Rather than referring to all the judgments which are cited before us, we would concentrate on Mohanlal Soni which takes into consideration relevant judgments on the scope of Section 311 and lays down the principles. Mohanlal Soni is followed in all subsequent judgments. In Mohanlal Soni this Court was considered the scope of Section 540 of the Code of Criminal Procedure, 1898 (the old code) which is similar to Section 311 of the Code. This Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. The relevant observations of this Court are as under:

".....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

This Court further observed as under :-

"..... 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."

12. While dealing with Section 311 of the Code in *Rajendra Prasad* this Court explained what is lacuna in the prosecution as under :

"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."

13. Reference must also be made to the observations of this Court in ***Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors., 2004(2) RCR (Criminal) 836 : (2004) 4 SCC 158*** where this Court described the scope of Section 311 of the Code as under :

"Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the

evidence in aid of a just decision and to uphold the truth.””

In ***Mannan Sk. and others Vs. State of West Bengal and another : 2014(4) R.C.R.(Criminal) 617*** Hon'ble Supreme Court held that justice could not be allowed to suffer because of the oversight of the prosecution and allowed witness to be recalled for examination after 22 years.

In the present case the petitioner is seeking recalling of the victim girl child for further cross-examination on the grounds that there are material contradictions in statement dated 06.05.2019 made under Section 161 of the Cr.P.C., statement dated 06.05.2019 made under Section 164 of the Cr.P.C. and statement dated 20.12.2019 made during trial by the victim girl child and some material questions in this regard were not put to her by his previous Counsel which facts came to his knowledge after the petitioner engaged his new Counsel. Detailed references have been made to point out the contradictions/discrepancies comprehensible on comparative reading of the said statements which need not be reproduced here. Suffices it to observe that the petitioner cannot be made to suffer for inadvertent omission on the part of his previous Counsel to put material questions to the victim girl child with regard to the same and recalling of the victim girl child for her re-examination is essential for just decision of the case. The Court has to be magnanimous in permitting such omissions to be remedied. No prejudice will be caused to the prosecution as the prosecution will be entitled to re-examine the witness in case any new facts and circumstances emerge during her further cross-examination.

In view of the facts and circumstances of the case and the

above referred judicial precedents, the petition is partly allowed, the impugned order dated 12.03.2021 passed by learned Additional Sessions Judge (Fast Track Special Court), Ludhiana (D) is set aside, the application under Section 311 of the Cr.P.C. is partly allowed and victim girl child is ordered to be recalled for further cross-examination subject to payment of Rs.10,000/- as expenses to the victim girl child. However, the petitioner will be given only one effective opportunity for cross-examination of the victim girl child.

A copy of this order be sent to learned District and Sessions Judge, Ludhiana for forwarding the same to the Court concerned for ensuring requisite compliance with the order.

31.03.2021

Vinay

(ARUN KUMAR TYAGI)
JUDGE

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