206 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-38052-2013 (O&M)
Date of decision: 16.01.2019

Bhupinder Kaur ...Petitioner

Versus

State of Punjab and others ...Respondents

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mrs. Baljit Mann, Advocate, for the petitioner.

Mr. Rajat Bansal, AAG, Punjab
for respondent No.1-State.

Mr. Lovekirat S. Chahal, Advocate
for respondents No.2 and 3.

RAJBIR SEHRAWAT, J. (ORAL)

Prayer in the petition is for setting aside the order dated 18.09.2013 passed by the Additional Sessions Judge, SAS Nagar, Mohali (Annexure P-5); vide which the application under Section 311 Cr.P.C. filed by the petitioner seeking her re-examination as a witness in the trial in case FIR No.37 dated 13.07.2010 under Sections 365/120-B of IPC (Section 364 IPC added later on) at Police Station Phase XI, SAS Nagar, Mohali (Annexure P-1), has been dismissed.

The facts leading to the filing of the present petition are that the petitioner herein is a widow, who had only son, namely, Gurdeep Singh. The son of the petitioner was married to the daughter of the accused-Jagbir Singh on 13.11.2008. The accused-Jagbir Singh was serving as Sub-Inspector in the Punjab Police and was posted at CIA, Mohali. However, as the facts unfold, the matrimonial aspect between the son of the petitioner and the daughter of the accused-Jagbir Singh did not go well. Therefore, the

accused-Jagbir Singh himself got lodged an FIR on 29.05.2009; involving the present petitioner and her son; with the alleged offences under Sections 343, 323, 506, 406, 420, 34 of IPC and Section 25 of Arms Act, at Police Station Phase-VIII, Mohali. However, the matter did not stop there. Another FIR was got lodged on 02.06.2009 by Ranjit Kaur, the wife of the accused-Jagbir Singh.

Feeling pressurized because of these FIRs, the petitioner and her son had entered into a settlement with the accused-Jagbir Singh and his wife so that the FIRs could be got quashed. The interesting condition imposed for settlement of the FIRs was that son of the petitioner, namely, Gurdeep Singh would leave his widowed mother and would start living with the accused along with his wife, besides paying the other miscellaneous expenses for settling the FIRs. As a result, the son of the petitioner started living with the family of the accused-Jagbir Singh and the FIRs were got quashed through petitions filed on the basis of the compromise.

However, on 03.07.2010, the son of the petitioner came to meet her and he had informed the petitioner that he was feeling distressed because he had a quarrel with his wife and mother-in-law, the previous night. But on 04.07.2010, son of the petitioner left the house of the petitioner/complainant. Thereafter, he did not return to the petitioner. She had made several calls to her son on his mobile phones. At about 1.00 p.m., on 04.07.2010, he said that he would come to meet the petitioner. However, thereafter, he stopped picking up the calls. After 8.00 p.m., on the same day, the mobile phone of the son of the petitioner was 'not reachable'.

Thereafter, the petitioner started searching for her son. However, she could not get any clue about whereabout of her son. Hence,

she approached the police on 06.07.2010 and lodged a missing report. The police registered a DDR on the statement of the petitioner, in which she had stated that her son had gone missing and she does not have any clue regarding whereabouts her son. Also, she stated that she does not have any suspicion against anybody.

Later on, one Satnam Singh met the petitioner and informed her that on 04.07.2010 itself, he happened to have met the son of the petitioner. He was in apparent hurry. When Satnam Singh questioned the son of the petitioner as to why he was in hurry, the later informed that he had been called by his father-in-law. Thereafter, son of the petitioner went, supposedly, to his father-in-law. Accordingly, the petitioner contacted the father-in-law his son, namely, the accused-Jagbir Singh. However, no satisfactory reply was given by him. This lead the petitioner to approach the police again to make a statement describing all these happenings. In addition to these facts, the petitioner also disclosed to the police that; in the meantime on 03.07.2010 itself, the wife of the son of the petitioner, namely, Jaspreet Kaur had left for USA. It was also disclosed that the petitioner went to the house of the accused-Jagbir Singh, to know about the exact situation, however, their house was found locked. On the basis of this gamut of circumstances, the petitioner asserted in the statement that accused-Jagbir Singh, his daughter-Jaspreet Kaur and his wife-Ranjit Kaur, all three have conspired to eliminate the son of the petitioner. On the basis of this statement, the FIR was got registered by the petitioner. However, since the dead body of the son of the petitioner was not recovered, therefore, the case was registered under Sections 365 read with Section 120-B of IPC and Section 364 of IPC added later on.

In the meantime, one more fact needs to be noted that despite the petitioner approaching the police, the police were not registering the FIR. Therefore, the petitioner had to approach the Court of Magistrate under Section 156 Cr.P.C. for getting the FIR registered. Only thereafter, the FIR was registered by the police.

However, despite the FIR having been registered, the police were neither investigating the case nor any report was filed before the Court, therefore, the petitioner had to approach the High Court seeking a direction that the investigation of the case be handed over to some independent agency/higher Authorities. This Court ordered that the Special Investigation Team (SIT) be constituted to investigate the case.

After investigation of the case, the police filed challan against accused-Jagbir Singh. Regarding the other two accused, the SIT had represented before the Court that no evidence, sufficient to file report under Section 173 Cr.P.C. was found against Jaspreet Kaur and Ranjit Kaur. Hence, no challan was filed against them.

The trial of the case started and the statement of the petitioner was recorded. Besides her, the other two witnesses, namely, Gurjit Singh PW-1 and Rashpal Singh, PW-3 were also examined. The statement of the other witnesses duly reflects towards the discord and quarrel between the son of the petitioner and his wife and mother-in-law. However, the petitioner instead of deposing as to the facts as contained in the FIR, she deposed before the trial Court as per the version given in the DDR; which was recorded in the first instance. The statements of the witnesses of the petitioner have also been attached with the petition.

A perusal of the statement of the petitioner before the Court

also shows that the public prosecutor had raised the objections qua omission of certain portions; which were mentioned in the FIR but which had not come in the statement of the petitioner made before the Court. The public prosecutor had sought to get the petitioner declared as a hostile witness. However, the trial Court had not accepted the objection and refused to declare the petitioner as hostile witness. Thereafter, the cross-examination of the petitioner was also completed.

Finding that the portion regarding the aspect of conspiracy hatched by Jagbir Singh, his wife and daughter to eliminate the son of the petitioner, as was alleged by the petitioner in the FIR, had not come in her deposition, the petitioner moved an application under Section 311 Cr.P.C. for permitting her to be re-examined. This application was dismissed by the trial Court. Therefore, the present revision petition has been filed.

While arguing the case, learned counsel for the petitioner has submitted that she had disclosed the sequence of the facts before the trial Court and also deposed that she had the suspicion that Jagbir Singh, the accused eliminated her son. However, inadvertently; she could not include in her examination-in-chief the aspect which related to the conspiracy of the accused -Jagbir Singh, his wife-Ranjit Kaur and his daughter-Jaspreet Kaur. It is further submitted that the public prosecutor had immediately realized this aspect. Therefore, even a prayer was made by the public prosecutor that he be permitted to cross-examine the petitioner qua the facts pertaining to conspiracy; as mentioned by the petitioner in the FIR. However, that request was also declined. Hence, it is contended that the petitioner being a widowed lady of old age, who had lost her only son had not properly understood the import of deposition made by her, objection raised by the

public prosecutor and the effect of omission in her deposition. However, if the aspect of conspiracy is not permitted to be brought on record; then the interest of justice would be severely impaired. Hence, it would result in a great in justice and the trial would be rendered incomplete qua the allegations involved in the case. Therefore, the learned counsel for the petitioner has argued that, the application moved by the petitioner; which has been dismissed by the trial Court, be ordered to be allowed.

It is further contended by the counsel for the petitioner that the trial Court has totally misunderstood *inter se* import of Section 311 Cr.P.C. and Section 138 of the Indian Evidence Act. Therefore, the trial Court has considered only Section 138 of the Indian Evidence Act; to arrive at a conclusion whether the petitioner should be permitted to be re-examined or not. The consideration as required by Section 311 Cr.P.C., for examination or re-examination of a witness; as was prayed for by the petitioner, was not even adverted to; by the trial Court. Hence, as is clear from the order, the trial Court has not even recorded its satisfaction whether re-examination of the petitioner would be necessary for the just decision of the case or not.

Still further, it is contended by the learned counsel for the petitioner that; by any means; the petitioner is not introducing any new case. The facts, as are sought to be brought on record in the deposition of the petitioner, are already contained in the FIR got registered by the petitioner. Learned counsel for the petitioner has also argued that even the defense has not dared to put any question to the petitioner in her cross-examination; regarding the aspect of conspiracy which was stated by the petitioner in the FIR. Rather to avoid the factum of conspiracy coming on record of the case, the defense has not even put the FIR or its contents to the petitioner in her

cross-examination. Hence, in a way; the defense has admitted the contents of FIR qua the conspiracy.

On the other hand, learned counsel for respondents No.2 and 3 has submitted that the first version of the incident is as was given by the petitioner and contained in the DDR dated 06.07.2010. However, in the said DDR, the names of the answering respondents were not mentioned. There is no allegation of any conspiracy. On the contrary, the version as given by the petitioner is that she did not know as to where the son of the petitioner has gone. It is further contended that although in the version given in the FIR on 13.07.2010, the petitioner has tried to introduce the names of respondents No.2 and 3, however, there are no specific allegations against them. In the FIR also, the names of respondents No.2 and 3 are mentioned only in a passing reference made by the petitioner to the effect that the respondents No.2 and 3 have also conspired to eliminate the son of the petitioner. It is further contended by the learned counsel for respondents No.2 and 3 that the examination-in-chief of the petitioner was recorded on 27.09.2012. Despite that she had not deposed anything showing the culpability of respondents No.2 and 3. The petitioner had made a detailed statement to the Court. The accused had restricted the cross-examination of the petitioner only qua the case alleged against him. Respondents No.2 and 3 were not even present before the Court at the relevant time. Therefore, any omission to cross-examine the petitioner on any aspect cannot be taken as adverse against respondents No.2 and 3. It is further contended that even the SIT, constituted pursuant to the order passed by this Court, had exonerated the respondents No.2 and 3. Therefore, the application under Section 311 Cr.P.C. has rightly been dismissed by the Court below, the same

being conjectural in nature.

Learned counsel for the State has referred to the reply filed by the State and submitted that the trial Court has rightly dismissed the application. The petitioner was granted ample opportunity to depose freely when she was being examined in examination-in-chief. It is further contended that examination-in-chief and the cross-examination are absolute and there is nothing in her cross-examination which requires her to be re-examined as per Section 138 of the Indian Evidence Act. Hence, the present petition deserves to be dismissed.

Before proceeding further, it would be apposite to refer to the provisions of Section 311 Cr.P.C. and Section 138 of the Indian Evidence Act, which are as under:-

> ***Section 311 Cr.P.C.***
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> "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.
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> ***Section 138 of the Indian Evidence Act***
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> **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.
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> **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. ”

A perusal of the above provisions makes it clear that the provision of Section 138 of the Indian Evidence Act is to be pressed into service on mere desire of the witness or a party who is examining the witness. This section is only a rule of evidence and defines the order of examination of witness. This Section, however, provides that in case of such re-examination, the same shall be restricted to the additional question which have arisen during the cross examination of the witness. Still further, the section provides that if a witness is re-examined then such a witness can be cross-examined by the other side, however, that can be done only if new matter is introduced in re-examination with the permission of the Court. Therefore, this shows that Section 138 has a well-defined scope as to when it is to be invoked, and is bounded by parameters specified therein. The section can be freely used by the witness or party for re-examination irrespective of the permission of the Court, subject to the scope of re-examination prescribed by this Section.

On the other hand, Section 311 Cr.P.C. is a rule of procedure of trial by a Court and is relating to the discretion of and duty cast upon the Court. This Section does not give any right; as such; to any party to move the Court for calling or recalling of a witness for examination or re-examination. However, this section gives ample powers to the Trial Court that it can call any person as a witness, whether in the attendance of the Court or not. The Court can examine and re-examine any witness as it deems fit. But, this Section further casts a duty upon the trial Court that if such evidence appears to be essential for the just decision of the case then

the trial Court shall be duty bound to call such person to appear as a witness in examination or re-examination, as the case may be. Therefore, Section 311 Cr.P.C. is mainly relating to the discretion of the Court in one part; and a duty caste upon the trial Court in the second part. The common strain running through both the parts of Section 311 Cr.P.C. is the just decision of the case and the interest of justice that would be served if any such witness is examined or re-examined by the Court.

The above explained scope of Section 311 Cr.P.C. and Section 138 of the Indian Evidence Act makes it clear that there is absolutely no over-laping between the two sections. Merely because the case of a party is not covered under Section 138 of the Indian Evidence Act, would not be any ground to debar such a party or witness to move an application under Section 311 Cr.P.C. The provision of Section 311 Cr.P.C. is independent and irrespective of Section 138 of the Indian Evidence Act.

While applying its mind on the aspect of permitting examination or re-examination of a witness under Section 311 Cr.P.C., the trial Court need not restrict itself to enquire into an aspect whether such re-examination has become necessary because of some facts coming in cross-examination or not, as is required under Section 138 of Indian Evidence Act. The sole criteria for exercising power vested under Section 311 Cr.P.C. is the interest of justice and the necessity of such examination or re-examination for just decision of the case. If any other element is introduced while exercising power under Section 311 Cr.P.C., then it would not be unjustified to say that there is a material irregularity in exercise power by the trial Court.

Applying the above said propositions of law to the facts of the

present case, this Court finds that the trial Court has dismissed the application filed by the petitioner merely on the ground that the case of the petitioner is not covered under Section 138 of the Indian Evidence Act. This is not correct application of Section 311 Cr.P.C. by the trial Court. This Court agrees with the submissions made by learned counsel for the petitioner that, while exercising power under Section 311 Cr.P.C. in the present case, the trial Court has not even adverted to the criteria which is required to be taken into consideration as per the mandate under Section 311 Cr.P.C. Learned counsel for the petitioner has rightly pointed out that the trial Court has not even recorded its satisfaction that re-examination of the petitioner is not required for just decision of the case or that it is not in the interest of justice to permit her to get re-examined. Therefore, this Court finds that the order passed by the trial Court is not as per the mandate the provision of Section 311 Cr.P.C.

Although, the learned counsel for the respondents has submitted that the trial Court has observed in the impugned order that the examination-in-chief is detailed one and the petitioner had the ample opportunity to depose against respondents No.2 and 3 in examination-in-chief and cross-examination, still she has not deposed, therefore, she did not deserve to be granted any opportunity to re-examine herself. However, this Court finds that there is no such observation by the trial Court. The trial Court has only given details of the statement made in examination-in-chief by the petitioner and it is observed that the statement of the petitioner has restricted the case to the allegations against the accused-Jagbir Singh and she has carried forward the same stand in cross-examination. After these observation, the trial Court has again taken the case towards the scope of

Section 138 of the Indian Evidence Act, instead of deciding it as per the criteria required under Section 311 Cr.P.C.

Otherwise also on this aspect, this Court does not find any force in the arguments of learned counsel for the respondents No.2 and 3 because of two reasons:- Firstly, the cross-examination of the petitioner was not at her discretion. The questions during the cross-examination were chosen by the defense. The petitioner was only being honest; while answering the questions straightway as per the law. Hence, she had not gone to volunteer and disclose these facts in the cross-examination, for which she is now before the Court in an application under Section 311 Cr.P.C. This restriction of the petitioner only to the questions asked during the cross-examination reflects upon the simpleton nature of the petitioner. Secondly, the trial Court has also not taken note of the fact that the examination-in-chief of the petitioner was not unquestioned. As mentioned above, the objection of the public prosecutor qua omission qua the part of conspiracy, had immediately come on record. However, that objection was over-ruled by the trial Court. This had effectively prevented the full facts coming on record of the case, which can now be brought on record only through re-examination of the petitioner.

Be that as it may, the criminal prosecution of an accused is the function of the public penal law; the offence being a conduct of the accused against the society as such. It is only for this reason that the absolute discretion is given to the courts to examine or re-examine any witness as it deems fit to arrive at a just decision. Therefore, mere fact that in the first instance, the part of conspiracy was omitted while disposing in examination-in-chief; cannot be a reason or criteria for declining an application moved

under Section 311 Cr.P.C. The ultimate test which the trial Court was required to apply was whether the statement, which the petitioner now wants to make, is necessary for just decision of the case or not. Needless to say that the application under Section 311 Cr.P.C. cannot be declined by the trial Court even if the same is, allegedly, intended to fill-up the lacuna left in the case of the prosecution. Any supposed lacuna, which is pleaded by the defense, and which is, allegedly, sought to be filled-up by the witness is totally irrelevant for the purpose of power to be exercised under Section 311 Cr.P.C. The trial Court is primarily concerned with arriving at the truth about the facts in issue. Therefore, the parameters for exercising powers under Section 311 Cr.P.C. are well defined; that it may be exercised in a case where it appears to Court to be necessary in the interest of justice and this power is bound to be exercised by the Court when the same is necessary for the just decision of the case.

Hence, this Court finds that the dismissal of the application by the Court below is not as per the standards of law as prescribed under section 311 Cr.P.C.

In ordinary course, the matter should have been remanded to the trial Court for fresh decision on application under Section 311 Cr.P.C. However, this Court finds that the case pertains to the year 2010. Even before this Court, the present petition is pending since 2013 and the proceedings before the trial Court are stayed since then, even qua the main accused. Therefore, this Court does not consider it appropriate to remit the matter to the trial Court for the limited purpose of re-decision on the application under Section 311 Cr.P.C. Rather, keeping in view the fact that the factum which the petitioner intends to bring on record now, through re-

examination; already find mentioned in the FIR, and Section 311 Cr.P.C. is not invoked for the purpose of introducing any new fact; and coupled with the fact that the accused/respondent shall be having full opportunity to cross-examine on these aspect once again, this Court deems it appropriate that the present petition be allowed and the trial Court be directed to permit the petitioner to get herself re-examined in the trial. Although there may be certain aspects which may positively reflect in favour of the petitioner to bring her case clearly within requirements of Section 311 Cr.P.C., however, this Court has refrained from expressing any opinion on any aspect whatsoever, lest it should effect the case of the accused or either of the parties.

In view of the above, the petition is allowed. The trial Court is directed to grant one effective opportunity to the petitioner to get herself re-examined. The defense shall also be entitled to, consequently, cross-examine the petitioner.

(RAJBIR SEHRAWAT)
JUDGE

16.01.2019
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Whether speaking / reasoned : Yes No
Whether Reportable : Yes No