

Before Lalit Batra, J.

RAJINDER KUMAR—*Petitioner*

versus

STATE OF PUNJAB AND ANOTHER—*Respondents*

CRM-M No.19624 of 2021

December 20, 2021

Code of Criminal Procedure, 1973—Ss.311 and 482—Indian Penal Code, 1880—Ss.302 and 427—Petition filed by Petitioner/Complainant challenging order of Trial Court dismissing his application filed through Public Prosecutor for summoning eyewitness—If proper evidence not adduced or relevant material not brought on record due to inadvertence—Court to be magnanimous in permitting rectification—Function of criminal Court—Administration of criminal justice, not to count errors committed by parties—Section 311—Any Court may, at any stage of any inquiry, trial or other proceedings, summon any person as witness, or examine any person in attendance though, not summoned as witness, or recall and re-examine, any person already examined—If his evidence appears to it be essential to just decision of the case—No party in a trial can be force-closed from correcting errors—Petition allowed.

Held that, 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 “Rajendra Prasad Versus The Narcotic Cell through its Officer-in-charge Delhi” (1999) SCC (Cri) 1062.

(Para 7)

Further held that, in the above said ruling, while dealing with provisions of Section 311 Cr.P.C., Hon’ble Supreme Court further observed that no party in a trial can be force-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, functions 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.

(Para 8)

Further held that, Section 311 Cr.P.C. provides that any Court may, at any stage of any inquiry, trial or other proceedings 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 examine any such person if his evidence appears to it be essential to the just decision of the case.

(Para 9)

Preetinder Singh Ahluwalia, Advocate
for the petitioner.

Mehardeep Singh, Addtl. A.G.,
Punjabfor respondent No.1-State.

Gopal Singh Nahel, Advocate
for respondent No.2/accused-Sukhbir Singh @ Sukha.

LALIT BATRA, J.(oral)

(1) This petition under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”) has been filed by petitioner- Rajinder Kumar (complainant) impugning the legality of order dated 07.04.2021 (Annexure P/10) rendered by Additional Sessions Judge, Sangrur, in Sessions Case No.101 of 2017 titled 'State Vs. Sukhbir Singh @ Sukha', FIR No.97 dated 30.07.2017 under Sections 302 and 427 IPC, Police Station Lehra, District Sangrur, in terms of which, application dated 25.03.2021 (Annexure P/9) moved by petitioner/complainant through Public Prosecutor under Section 311 Cr.P.C. for summoning and examination of Arashdeep Singh son of Amarjit Singh, as prosecution witness, has been dismissed and consequently prayer to allow said application under Section 311 Cr.P.C., has been made.

(2) Application under Section 311 Cr.P.C. (Annexure P/9) was moved by petitioner/complainant through Public Prosecutor before the Trial Court with the averments that during the course of trial of case FIR No.97 dated 30.07.2017, as detailed above, prosecution has

examined petitioner/ complainant-Rajinder Kumar son of Ramesh Chand as PW-15 on 13.12.2019/27.04.2021, wherein he stated on oath that at the time of occurrence in question, he was accompanied by his cousin-Arashdeep and said Arashdeep is an eyewitness to the incident. It is further averred that during investigation, when above said Arashdeep appeared before the police, he suffered a statement in the presence of petitioner/complainant- Rajinder Kumar, affirming his presence at the place of occurrence. It is further averred that during his testimony before Trial Court, PW-15 Rajinder Kumar has proved his statement (Ex.P-15/A), wherein he mentioned Arashdeep as eyewitness to the occurrence in question. It is cardinal principle of evidence that the best available evidence should be brought before the Court. Statement of Arashdeep son of Amarjit Singh 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 Arashdeep son of Amarjit Singh, resident of Village Alisher, 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 status report in the instant petition wherein prayer for dismissal of petition has been made, however, when confronted with above said status report, 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, status report dated 26.07.2021 filed in this Court at the instance of respondent No.1-State and that too resisting the cause of petitioner (complainant), said status report appears to have been filed due to some mistake and it may not be read for the purpose of this petition.

(4) No reply at the instance of respondent No.2-accused has been filed.

(5) I have heard learned counsel for the parties and have carefully gone through the record of the case.

(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 No.1-State wants to summon and examine witness namely Arashdeep son of Amarjit Singh. It is the case of petitioner (complainant) that in order to complete the chain of events especially to show that incident in question was witnessed by Arashdeep as

well, said aspect is to be brought on record in the manner that above said Arashdeep son of Amarjit Singh was eyewitness to the alleged incident. Learned counsel for the petitioner (complainant) has specifically pointed out that during investigation, petitioner-Rajinder Kumar (complainant) in his supplementary statement dated 31.07.2017 recorded under Section 161 Cr.P.C. and further in the statement dated 06.09.2017 made before Special Investigation Team (SIT), had disclosed about presence of witness-Arashdeep son of Amarjit Singh at the time of occurrence in question but police did not cite above said Arashdeep as a witness in the list of witnesses of prosecution and when petitioner/complainant (Rajinder Kumar) appeared in Court as prosecution witness (PW-15), he has categorically stated that at the time of occurrence in question, above said Arashdeep was accompanying him as pillion rider. Learned counsel for the petitioner (complainant) has emphatically contended that since name of Arashdeep was mentioned by petitioner/ complainant-Rajinder Kumar during his statement recorded on 06.09.2017 and further the fact that above said statement was corroborated by said Arashdeep, however, the police has not shown him (Arashdeep) as witness in the list of witnesses, said circumstance cannot be termed as an improvement in the version so as to fill up lacuna in the prosecution story but as a matter of fact summoning and examination of said Arashdeep as witness is essential and necessary 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 *Rajendra Prasad versus The Narcotic Cell through its Officer-in charge Delhi*¹.

(8) In the above said ruling, while dealing with provisions of Section 311 Cr.P.C., Hon'ble Supreme Court further observed that no party in a trial can be fore-closed from correcting errors. If proper

¹ (1999) SCC (Cri) 1062.

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 *Janeshwar Dutt* versus *Sanjiv Kumar*² 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 *Hanuman Ram* versus *The State of Rajasthan and others*³, Hon'ble Supreme Court has laid down the object underlying Section 311 Cr.P.C. which reads as under:-

“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 “at any

² 2007 (2) R.C.R. (Cri) 628 (P&H),

³ 2008 (4) RCR (Criminal) 823

stage of 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 wide the power the greater is the necessity for application of judicial mind”.

(11) To this effect, reliance can also be placed upon ruling *Godrej Pacific Tech. Ltd. versus Computer Joint India Ltd.*⁴

(12) Hon'ble Supreme Court in case of *Raja Ram Prasad Yadav versus State of Bihar and another*⁵, 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 read as under:-

“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

⁴ 2008 (11) SCC 108.

⁵ AIR 2013 SC 3081

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.”

(13) 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 *Vinod Kumar* versus *State of Punjab*⁶.

(14) I have considered the facts and circumstances of this case. A perusal of statement dated 13.12.2019 (Annexure P/8) of complainant/PW-15 Rajinder Kumar (petitioner herein), reveals that at the time of occurrence in question, he (petitioner being driver) alongwith his cousin- Arashdeep (being pillion rider) on motorcycle bearing registration No.PB- 10-EQ-7110 was following his father-Harmesh Chand (since deceased) who was going ahead of them on his scooter make *Vespa* bearing registration No.PB-31D-5471. Further, two days after formation of Special Investigation Team (SIT), third statement of petitioner/complainant-Rajinder Kumar was recorded on 06.09.2017 (Ex.P-15/A) which reveals that Arashdeep (cousin of petitioner/complainant) was accompanying him at the time of occurrence in question and even there is an endorsement of the said fact by Arashdeep at the foot of said statement. 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

⁶ 2016 (4) R.C.R. (CrI.) 683 (P&H).

committed by the Prosecuting Agency conducting the case.

(15) 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 No.1-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 Arashdeep son of Amarjit Singh, resident of Village Alisher, in the list of prosecution witnesses and examination of said Arashdeep as prosecution witness, appears to be essential for the just decision of the case. Impugned order dated 07.04.2021 (Annexure P/10) 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.

(16) As a sequel to above, instant petition is allowed and the impugned order dated 07.04.2021 (Annexure P/10) 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 summon and examine Arashdeep son of Amarjit Singh as prosecution witness, is hereby set aside. Resultantly, application under Section 311 Cr.P.C. dated 25.03.2021 (Annexure P/9) 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 Arashdeep son of Amarjit Singh, resident of Village Alisher, in the list of prosecution witnesses and to summon and examine said Arashdeep as prosecution witness. Since instant case FIR pertains to the year 2017 and respondent No.2-accused is languishing in custody, the Trial Court shall fix a date of hearing at the earliest to call and examine witness namely Arashdeep son of Amarjit Singh and accord opportunity to the accused to cross-examine said witness and thereafter, proceed with the trial and that too as expeditiously as possible.

Shubreet Kaur