IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

235 **CRR 361-2022 (O&M)**
Date of Decision: 18.04.2024

Sandesh ...Petitioner

Versus

State of Haryana and another ... Respondents

CORAM : HON'BLE MR. JUSTICE N.S.SHEKHAWAT

Present : Mr. Ankur Lal, Advocate, for the petitioner.
Ms. Sheenu Sura, DAG, Haryana.
Mr. B.K. Bagri, Advocate, for respondent No. 2.

N.S.SHEKHAWAT, J. (Oral)

1. The petitioner has preferred the present petition against the impugned order dated 15.02.2022 passed by the Court of Additional Sessions Judge, Jhajjar, whereby, the application under Section 311 Cr.P.C. moved by the prosecution was allowed in a criminal case titled as "**State Vs. Parvinder & and another",** arising out of FIR No. 322 dated 29.10.2019 under Sections 302, 201, 346, 364 and 34 IPC, registered at Police Station Sadar Jhajjar.

2. Tersely put, the facts which led to the registration of the FIR in the present case are that the FIR was initially registered on the basis of complaint moved by Bhagwanti Devi wife of Shamsher Singh, who stated that on 28.10.2019, her husband Shamsher Singh had left the residence at about 10.30 a.m. without disclosing anything to her. She called him up at around 06.00 p.m. and he told that he was with Parvinder (accused). On 29.10.2019, in the morning, she again

made a call to her husband, which was attended by someone else, and thereafter, the phone of her husband was brought to her by Sukhpal, friend of her husband, who got it from Sanjay Yadav. She stated that her husband was not traceable and the FIR was registered against unknown persons. On 30.10.2019, the dead body of Shamsher Singh was discovered in a canal and the offence under Section 302 IPC was added in the present case. Parvinder (accused) was arrested on 30.10.2019.

3. During the course of trial, the statement of complainant was recorded as PW1 and statement of Sandeep was recorded in part as PW2. After examination-in-chief of PW2 Sandeep was deferred, the prosecution moved the present application under Section 311 Cr.P.C., which was allowed by the trial Court by passing the impugned order. Challenging the legality of the impugned order, the learned counsel for the petitioner contends that the trial Court had acted on its own assumptions in arriving at a conclusion that annexure P-6 was a piece of evidence, which was just and essential for the fair decision of the case. He further contends that even from the photograph, it was not known as to when the photograph was clicked and even the deceased was not present/visible in the said photograph. He further contends that from annexure P-6, it is apparent that two boys are visible in the said photograph and, admittedly, one of the person visible in the said photograph is the petitioner. However, the identity of other person could not be ascertained. He further contends

that even from the statements of various witnesses of the prosecution, it was apparent that the petitioner was not present with the deceased. In fact, the photograph (Annexure P-6) had no connection with the death of the deceased. Further, there was no evidence to establish that the photograph was clicked soon before his death or that the petitioner or his co-accused were in the company of the deceased. Still further, it is highly improbable that a person, who had conspired to kill a man will proceed to publish the photograph of the victim with the caption "as published". Apart from that, the law is well settled that no one can be forced to appear as a witness against himself and the application moved by the prosecution is liable to be dismissed by this Court.

4. On advance notice, learned State counsel has appeared on behalf of the prosecution and submitted that the impugned order passed by the trial Court is well reasoned and is liable to be upheld by this Court.

5. I have heard the learned counsel for the parties and with their able assistance, I have perused the record carefully.

6. Before proceeding further, it would be relevant to examine Section 311 Cr.P.C., which 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."

7. In the recent judgment of ***Varsha Garg Versus The State of Madhya Pradesh & others, Criminal Appeal No. 1021 of 2022. Decided on 08.08.2022,*** it was held as under:

" 29. The first part of the statutory provision which uses the expression "may" postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30. A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed

"16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice."

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the "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." In that context the Court observed:

"18 …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."

31. Summing up the position as it obtained from various decisions of this Court, namely ***Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra****, the Court held:*

"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person

as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

32. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

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38. Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's

case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311. 39. In the decision in ***Zahira Habibullah Sheikh (5) v. State of Gujarat,*** *which was more recently reiterated in* ***Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.,*** *the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:*

"28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor

and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

(emphasis supplied)

40. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in Mina Lalita Baruwa (supra), while reiterating Rajendra Prasad (supra), the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In Rajendra Prasad (supra), the Court had held that

"8. 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."

(emphasis supplied)

In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.

41. Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on Swapan Kumar (supra), a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in Swapan Kumar (supra) observed:

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of the

decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court.

42. The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in Zahira Habibulla H. Sheikh (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast

and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

(emphasis supplied)

Further, in Zahira Habibullah Sheikh (5) (supra), the Court reiterated the extent of powers under Section 311 and held that:

"27. 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 thewitnesses 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."

43. The Court while reiterating the principle enunciated in Mohanlal Shamji Soni (supra) stressed upon the wide

ambit of Section 311 which allows the power to be exercised at any stage and held that:

"44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In ***Mohanlal v. Union of India*** *this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any*

discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. 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.

While reiterating the decisions of this Court in ***Karnel Singh v. State of M.P., Paras Yadav v. State of Bihar, Ram Bihari Yadav v. State of Bihar and Amar Singh v. Balwinder Singh*** *this Court held that the court may interfere even at the stage of appeal:*

"64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled

prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the socalled findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals."

44. For the above reasons, we have come to the conclusion that the decision of the High Court which is impugned in the appeal is unsustainable. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 8 April 2022 in Misc. Criminal Case No. 57152 of 2021 as well as the order of the Second Additional Session Judge, Dr. Ambedkar Nagar, District Indore dated 13 November 2021 in Sessions Trial 227 of 2016 dismissing the application filed by the prosecution. The application filed by the prosecution for the production of the decoding registers and for the summoning of the witnesses of the cellular companies for that purpose is allowed. The Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore is directed to conclude Sessions Trial No. 227 of 2016 by 31 October 2022.

(emphasis supplied).

8. The law is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case. If the 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. No doubt, the prosecution can never be allowed to fill up the lacuna and the Court's determination of the application should be based only on the test of essentiality of evidence. Even the Court is under a legal obligation to satisfy itself that it was in every respect, it is essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

9. Adverting to the facts of the present case, it is apparent that the occurrence had taken place on 28.10.2019 and the Facebook post from the profile ID of Sandesh, accused, was itself of 29.10.2019, i.e., next day of the murder of Shamsher Singh containing a caption written in Hindi as ***"Chal Chla Chal Teri Aakhari Sans Tak".*** The trial Court has correctly observed that Bhagwanti Devi, complainant had clearly mentioned in her complaint that when she made a phone call on 28.10.2019 to her husband Shamsher Singh (since deceased), he had replied that he was with Parvinder (accused). Even, Sonu son of Balwant, a witness of the prosecution had also

stated that on 28.10.2019, Sandesh (petitioner), Parvinder and Shamsher Singh (since deceased) had gone to a hill near village Khandolda on 28.10.2019 and while they were taking liqour, Shamsher Singh (since deceased), had given him his mobile and got clicked his photograph, in which, their photographs were also there and apparently, the said Facebook post, which is sought to be placed on record by way of the present application, is of 29.10.2019. Thus, the evidence, which is sought to be placed on record by the prosecution by moving the present application, is necessary for the just disposal of the case and the discretion under Section 311 Cr.P.C. has been correctly exercised by the trial Court. Even otherwise, if the photograph or any other evidence is ordered to be placed on record, no irreparable loss would be suffered by the accused, as they will get sufficient opportunity to cross-examine the witnesses with regard to the admissibility of the said document and would also be at liberty to lead their defence.

10. In view of the above discussion, the present petition is ordered to be dismissed.

18.04.2024 **(N.S.SHEKHAWAT)**
amit rana **JUDGE**

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