Before Satish Kumar Mittal, J

KHUSHWINDER SINGH AND ANOTHER,—*Pettitioners*

versus

STATE OF PUNJAB,—*Respondent*

Criminal Revision No. 2193 of 2006

30th October, 2006

Code of Criminal Procedure, 1973—S.311—Petitioners along with others facing trial on the charge of murder—Two eye witnesses declared hostile as they did not support prosecution version—Both witnesses by filing application under section 311 seeking permission for re-examination—Trial Court allowing the application—Challenge thereto-Under section 311 Court has wide power to recall and re-examine any person or witness if it feels that his evidence appears to be essential to the just decision of the case-Re-examination of both prosecution witnesses did not amount to filling lacunae in prosecution case-No prejudice to accused as they have full opportunity to cross-examine the recalled witnesses-No illegality or jurisdictional error in order of trial Court permitting witnesses for re-examination.

Held, that the power under the second part of Section 311 of the Code is not to be exercised in a routine manner, but is to be exercised in exceptional cases where the Court feels that the re-examination of the witness is necessary for the just decision of the case. If the witness who deposed one way earlier comes before the Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier. In the instant case, the trial Court has come to the conclusion that two prosecution witnesses, who earlier did not support the prosecution version, were not having fair opportunity to speak the truth as they were under the threat of the accused. Therefore, the Court while coming to the conclusion that re-examination of PW5 and PW6 is necessary for the just decision of the case has permitted them to be re-examined. In my opinion, re-examination of these two prosecution witnesses will not amount to filling lacunae in prosecution

case and to cause any prejudice to the accused, as they will be given full opportunity to cross-examine the recalled witnesses and secondly the earlier statements made by these witnesses is not going to be erased and wiped out from the record of the case. The trial Judge is to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on re-examination of these two prosecution witnesses. While deciding the case on merits, the trial court will take into consideration all the evidence available on the record.

(Para 12)

Sanjeev Manrai, Advocate, *for the petitioners.*

JUDGEMENT

SATISH KUMAR MITTAL, J.

(1) The petitioners, who are accused and are facing trial in case FIR No. 22 dated 19th February, 2004 under Sections 302/148/149/120-B IPC and Section 25/27/30/54/59 of the Arms Act, registered at police Station Rampura, have filed this revision petition praying for setting aside the order dated October 16, 2006, passed by Additional Sessions Judge, Bathinda, re-calling two prosecution witnesses, namely Nand Kishore (PW.5) and Vijay Kumar (PW.6) for their re-examination on an application filed by Nand Kishore, one of the witnesses, under Section 311 of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

(2) In this case, on the statemnt of Nand Kishore, the aforesaid FIR was registered immediately after the alleged occurrence. It was stated by the complainant that he and his elder brother Darshan Kumar deceased were liquor contractor in the area of Rajpura, Bhagta, Kotkapura, Jaito, Bajakhana circle. On 19th February, 2004, they along with driver Gura Singh had gone to Rampura Mandi, where they were having a rented house. After checking the accounts, they were going back to Bajakhana and the car was being driven by Darshan Kumar and when they reached the kacha drain bridge, a white Santro car came from the front side and stopped near their car. The said car was being driven by Inderjit Singh Bhatia. It was further stated by the complainant Nand Kishore

that Khushwinder Singh and Nirmaljit Singh (petitioners herein), who were sitting in the car, came out having pistols in their hands. Both of them fired from their respective weapons and killed Darshan Kumar, brother of the complainant. It was further stated in the FIR that the murder of Darshan Kumar was planned by Prabjinder Singh alias Dimpi son of Amarjit Singh, who was also having liquor business in the area and was having some money dispute with them. It was also stated by the complainant that he got a case under section 307 registered against them at Police Station Jaitu, which was later on cancelled.

(3) During the investigation of the instant case, on the disclosure statements of the petitioners, the weapons used in the alleged offence were recovered. Thereafter, the challan was filed and charges framed, and now the petitioners along with other accused are facing trial.

(4) During trial, Nand Kishore and Vijay Kumar were examiend by the prosecution as PW. 5 and PW.6, respectively. They did not support the prosecution version and were declared hostile. They were permitted to be cross examined by the Public Prosecutor. Subsequently, at a later stage, when the prosecution evidence was going on, PW.5 Nand Kishore filed an application under Section 311 of the Code for re-calling him as well as PW.6 Vijay Kumar for their re-examination in the interest of justice and for just decision of the case on the ground that earlier they could not depose true facts before the court, as they were under threat of elimination by the accused, who are influential persons and have criminal nexus with terrorists. It was stated that kingpin of the offeence Prabjinder Singh alias Dimpi, under whose threat they did not depose true facts before the court, has now expired, therefore, the terror of threat in their mind has been reduced and in the changed circumstances, they be permitted to be re-examined in the court. In the application, the complainant also produced copies of DDRs dated 16th October, 2004 and 8th November, 2004 showing that the witnesses were threatened by the accused in order to prevent them from deposing against the accused. The affidavit of Vijay Kumar witness was also produced to show that earlier, he avoided to depose against the accused for saving his family from being killed.

(5) The trial court, by following the law laid down by the Supreme Court in **Mohanlal Shamji Soni** *versus* **Union of India and another (1) and U.T. of Dadara and Haveli and another** *versus* **Fatehsinh Mohansinh Chauhan, (2)** and the decision of this Court in **State of Haryana** *versus* **Ram Parshad, (3)** allowed the said application and observed that in the facts and circumstances of the case, PW5 Nand Kishore and PW6 Vijay Kumar were under threat of elimination at the hands of the accused and, therefore, their re-examination is necessary for just decision of the case. The said order has been challenged in this revision petition by the accused.

(6) Counsel for the petitioners submits that the allegation of alleged threat by the accused to the witnesses is totally baseless. Actually, both the witnesses deposed freely before the court exonerating the accused from the alleged crime. They did not support the prosecution version voluntarily. Thereafter, they were declared hostile and were permitted to be cross-examined by the Public Prosecutor. Counsel submits that subsequently, these witnesses should not be permitted to be re-called for their re-examination, as it will cause a serious prejudice and manifest injustice to the accused. Now, these two prosecution witnesses, who earlier deposed voluntarily before the trial court, want to change their deposition after turning hostile with intention to falsely implicate the petitioners. Therefore, they should not be permitted to re-examined at this stage, when almost all the prosecution witnesses have been examined. Counsel for the petitioner submits that the power conferred under Section 311 of the Code should not be allowed to be used by those witnesses who want to take U-turn with an intention to falsely implicate the petitioners and to fill up the lacunae in the prosecution case and to make out a totally new case against the petitioenrs. He further submits that allowing such an application will neither be in the interest of justice nor the re-examination of such witnesses is essential for the just decision of the case. The only reason given by the trial court for re-calling these two witnesses for their re-examination is that earlier, they could not depose due to fear of elimination at the hands of Prabjinder Singh alias Dimpi and since he has expired, therefore, now they want to depose true facts before the court, as the alleged threat has now been

(1) 1991 Supp. (1) S.C.C. 271
(2) 2006 (4) R.C.R. (Criminal) 113
(3) 2005 (4) R.C.R. (Criminal) 976

reduced and only on such reason, a witness cannot be re-called for re-examination. In support of his contentions, counsel has relied upon the decisions of Supreme Court in **Mir Mohd. Omar and others** *versus* **State of West Bengal (4) and Nisar Khan alias Guddu and others** *versus* **State of Uttaranchal (5)** and submits that at the belated stage, application for re-calling the witnesses who earlier turned hostile should not be allowed.

(7) After hearing counsel for the petitioner and going through the impugned order and in the facts and circumstances of this case, I do not find any merit in the instant petition filed by the petitioners.

(8) As per the prosecution version, there are direct allegations against the petitioenrs. They are alleged to have fired on the deceased from their respective weapons and the occurrence was witnessed by PW.5 Nand Kishore. PW.6 Vijay Kumar is also one of the material witnesses. During the investigation, on the disclosure statement of the petitioners, recoveries of the alleged weapons of offence were made from them. Earlier, both the prosecution witnesses did not support the prosecution version. They were declared hostile and were permitted to be cross-examiend by the Public Prosecutor. Both these witnesses now state that they could not depose true facts before the court as they were under constant threat of elimination from the accused. The trial court, while taking into consideration the facts and circumstances of the case and copies of two DDRs dated 16th October, 2004 and 8th November, 2004 as well as affidavit of Vijay Kumar, primarily believed the statement of the witnesses that earlier they could not depose true facts before the court, as they were under threat at the hands of the accused, and came to the conclusion that re-calling of these two witnesses for their re examination is essential for the just decision of the case ; and thus, permitted these two witnesses to be re-called for their re-examination, while observing that in the changed circumstances, their re-examination is essential in the interest of justice.

(9) Section 311 of the Code reads as under :

> "311.**Power to summon material witness, or examine person persent**—Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon

(4) AIR 1989 S.C. 1785
(5) (2006) 2 S.C.C. (Crl.) 568

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."

This section provides wide powers to the court to enable it at any stage of any inquiry, trial or other proceedings under the Code, to do one of three things :

(a) to summon that person as a witness,

(b) to examine any person in attendance, though not summoned as a witness ;

(c) to recall and re-examine any person already examined.

So, where the evidence of any person appears to be essential to the just decision of the case, it is obligatory on the court to summon and examine or recall and re-examine any person or witness. The object of the provision as a whole is to have best available evidence, to do justice and to find out the truth and render a just decision of the case. The aid of this section should be invoked only with 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. As interpreted by the various decisions of the Supreme Court in **Jamatraj Kewalji Govani versus state of Maharashtra, (6) Mohanlal Shamji Soni** *versus* **Union of India and another, (supra), Rajindra Prasad** *versus* **Narcotic Cell (7) Zahira Habibulla H. Seikh and another** *versus* **State of Gujarat and others (8) and U.T. of Dadra and Haveli and another** *versus* **Fatehsinh Mohansinh Chauhan (supra),** Section 311 of the Code consists of two parts. First part gives a discretion to the court to sommon

(6) AIR 1968 S.C. 178
(7) 1999 (3) R.C.R. (Criminal) 440 (S.C.)
(8) (2004) 4 S.C.C. 158

any person as a witness, to examine any person at any stage, though not summoned as witness to re-call and summon any person already exmained. The second part is mandatory portion which compels the court to examine a witness and to re-call or re-examine any person, if his evidence appears to be essential to the just decision of the case. In a given case, if the court comes to the conclusion that re-examination of a particular witness is essential for the just decision of the case, then it is obligatory on the court to re-examine the said witness. The court has no other option. These mandatory obligations have been imposed on the court to enable it to arrive at truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for proper disposal of the case. The power in the second part is exercised by the court neither to help the prosecution nor the defence, but the same is exercised with an object of getting the evidence in aid of a just decision and to uphold the truth.

(10) Thus, it is well settled that these wide powers under section 311 of the Code have been awarded to enable the court to find out the truth and to render a just decision of the case. The discovery and vindication and establishment of truth are main purposes of the existence of courts of justice. The object of justice delivery system is to mete out justice and to convict the guilty and protect the innocent. The trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. (See **Zahira Habibulla H. Seikh and another** *versus* **State of Gujrat and other, (supra).** The assurance of a fair trial is the first imperative of the dispensation of justice. (See **Maneka Sanjay Gandhi** *versus* **Rani Jethmalani, (9)** Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. "Witnesses", as Bentham said : are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes

(9) (1979) 4 S.C.C. 167

and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or under threat or ignorance or some corrupt collusion.

(11) The Supreme Court in **Zahira Habibulla's case** *(supra),* has observed that time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not duffer even in slow process but irreversible and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. In such situation, the court has to play a vital role. Vast and wide powers have been conferred on the Presiding Officer of the court under Section 311 of the Code and Section 165 of the Evidence Act to elicit necessary evidence by playing an active role in the evidence collecting process, because the ultimate object of the judicial system is to arrive at a truth.

(12) It is also settled position of law that the power under the second part of Section 311 of the Code is not to be exercised in a routine manner, but is to be exercised in exceptional cases where the court feels that the re-examination of the witness is necessary

for the just decision of the case. If the witness who deposed one way earlier comes before court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier. In the instant case, the trial court has come to the conclusion that two prosecution witnesses, who earlier did not support the prosecution version, were not having fair opportunity to speak the truth as they were under the threat of the accused. Therefore, the court, while coming to the conclusion that re-examination of PW.5 Nand Kishore and PW.6 Vijay Kumar is necessary for the just decision of the case, has permitted them to be re-examined. In my opinion, re-examination of these two prosecution witnesses will not amount to filling lacunae in prosecution case and to cause any prejudice to the accused, as they will be given full opportunity to cross examine the re-called witnesses and secondly, the earlier statements made by these witnesses is not going to be earased and wiped out from the record of the case. The trial Judge is to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on re-examination of these two prosecution witnesses. While deciding the case on merits, the tiral court will take into consideration all the evidence available on the record. (See **Satyajit Banerjee and others** *versus* **State of W.B. and others (10).** The instant case is at the stage of prosecution evidence. The statements of the accused under Section 313 of the Code are yet to be recorded, therefore, the decision of the Supreme Court in **Mir Mohd. Omar and others** *versus* **State of West Bengal** *(supra)* is not applicable in the facts and circumstances of this case.

(13) In view of the above, I do not find any illegality or jurisdictional error in the impugned order.

(14) Dismissed.

R.N.R.

(10) (2005) 1 S.C.C. 115