

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MMO No.155/2019

Reserved on : 19.07.2019

Date of decision : 09.08.2019

Sham Singh

... Petitioner.

Versus

State of Himachal Pradesh and another

...Respondents

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

*Whether approved for reporting?*¹ No.

For the Petitioner : Mr. Peeyush Verma, Advocate.

For the Respondent : Mr. P.K. Bhatti and Mr. Shiv Pal Manhans,
Additional Advocate Generals, for the State.

Mr. C.N. Singh, Advocate, for Respondent
No.2.

Anoop Chitkara, Judge

The present criminal revision petition is filed under
Section 482 of the Code of Criminal Procedure for quashing of
order dated 5.2.2019, passed by learned Judicial Magistrate
1st Class, Court No.3, Hamirpur, H.P., in CNR

¹Whether reporters of Local Papers may be allowed to see the judgment?

No.HPHA020031282018 (881/2018), Cr.MA No.241-IV/2018 filed in Police Challan No.-06-I/15.

2. The victim, who works as a Junior Engineer in the IPH Department in Hamirpur, in her complaint, alleged that petitioner, Sham Singh, who is a Contractor, keeps on calling her on phone and pressurizes her to establish sexual relations with him. She further alleged that for the last six months, Contractor Sham Singh was mentally disturbing her. To corroborate her allegations, she also mentioned the phone numbers. She further alleged that he sends SMS on Facebook account. Although, she had ignored his friend request, he keeps on pressurizing her again and again to establish sexual relations with him. She further alleged that he used to chase her and when she strictly warned him not to indulge in these activities, then, he in connivance with some officials, got committed theft of two measurement books from her office and they started blackmailing her. In this regard, he also filed one RTI application and under that pretext, he states that he will get everything resolved if she agrees to establish sexual relations with him.

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3. Briefly, on these allegations, FIR No.77/2014 dated 7.4.2014, under Sections 354A, 354D, 379 and 506 of the Indian Penal Code, 1860 and Section 66A of the Information and Technology Act, 2000, was registered at Police Station, Sadar, District Hamirpur, Himachal Pradesh.

4. After investigation, police filed a report under Section 173 of the Code of Criminal Procedure and consequently, accused is facing the trial. During the pendency of the trial, the victim through Public Prosecutor filed an application under Section 311 of the Code of Criminal Procedure for placing on record one CD containing some vulgar remarks made by the accused. In the application, it was mentioned that such vulgar remarks had been made in the presence of one Keshav Kumar who is also a Government Contractor at Dhaneta. The victim in the application contends that the CD is very material and necessary for the proper adjudication of the trial and similarly examination of Keshav Kumar is also necessary to corroborate the allegation recorded in the CD.

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5. The trial Court, vide order dated 5.4.2019, allowed the application and ordered that the CD be taken on record. The trial Court further ordered examination of Keshav Kumar, the Government Contractor and summoned him for 15.5.2019. This order is under challenge vide the present petition.

6. I have heard Mr. Peeyush Verma, learned counsel for the petitioner and Mr. P.K. Bhatti and Mr. Shiv Pal Manhans, learned Additional Advocate General for the respondent/State and Mr. C.N. Singh, learned counsel appearing for the 2nd respondent/victim.

7. There are two limbs of arguments addressed by Mr. Peeyush Verma, learned counsel for the petitioner. The first limb touches the scope and powers under Section 311 of the Code of Criminal Procedure to summon such evidence at a belated stage and second limb of his arguments is that this application was simply a tactics played by the victim to drag on the prosecution and delay the outcome of the trial. The first limb of the argument has a very limited scope. The first limb of argument has hardly any substance. Section 311 of

the Code of Criminal Procedure defines the powers of criminal Courts to summon any person as a witness, at any stage of inquiry, trial or other proceedings, if such evidence appears to the Court to be essential to the just decision of the case.

8. In *Mohan Lal Shyamji, Soni, Mohan SMC vs. Union of India*, 1991 Cr.Law Journal, 152 (SC), the Hon'ble Supreme Court observed that the powers to summon any witness can be invoked even if the evidence of both the sides is closed so long the Court retains the sessions of the criminal proceedings.

9. Mr. C.N. Singh, learned counsel for respondent No.2, has placed reliance upon the decision of the Hon'ble Supreme Court in *Zahira Habibullah Sheikh vs. State of Gujarat*, 2006 (3) SCC 374, wherein, it has been held as under:-

“[27] The object underlying Sec. 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 Sec. 311, the significant expression that occurs "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.

[28] As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation : it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law

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of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. 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.

[29] The object of Sec. 311 is to bring on record evidence not only from the point of view of the

accused and the prosecution but also from the point of view of the orderly society. If a witness called by the Court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Sec. 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since, a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jamatraj Kewalji Govani v. State of Maharashtra*, 1967 (3) SCR 415 : AIR 1968 SC 178."

10. To counter this, Mr. Peeyush Verma, learned counsel appearing for the petitioner, placed reliance upon Section 65 of the Indian Evidence Act, wherein the mandatory requirement of Certificate being annexed with electronic record is missing. The other contention of Mr. Peeyush Verma, learned counsel is that the main allegation of the victim in the complaint was that the accused got conducted

theft of measurement books, whereas the police did not find any substance in her allegations and cancellation report was filed.

11. To repeal this contention, learned Additional Advocate General, submits that in case the victim had made a false complaint, then they can always take recourse to Section 182 of the Indian Penal Code. He further contends that this is no ground to deny the leading of the additional evidence which relates to vulgar remarks. The next contention of learned counsel for the petitioner is that the bare reading of this application under Section 311 of the Code of Criminal Procedure which led to the passing of the impugned order is cryptic and does not contain the transcript of the CD. It simply mentions that there were vulgar remarks but the vulgar remarks should have been reproduced to enable the Trial Court to call for the additional evidence. The counsel for the respondent counter this contention by submitting that the contents of the CD are to be seen at the time of trial.

12. This Court is of the opinion that there is no necessity to refer all the vulgar remarks in such kind of application because the victim had placed on record CD, which can always be played by the Court to decipher the allegations. This is not an order, but allegations of vulgar remarks by a lady. The possibility cannot be ruled out that to save her dignity, she might have restrained from reproducing the text of the audio recording. Even otherwise, in the absence of hearing the CD, no conclusion can be drawn that it did contain obscene language or not.

13. Therefore, the first limb of the argument has no substance and is without any merit.

14. Coming to the second limb of argument that these proceedings are with a view to delay the trial. This argument itself is contradictory to the effect that through the impugned order, the witness was summoned for 15.5.2019 and because of this petition, the trial Court proceedings are delayed till date. If the accused was very serious in early disposal of the entire trial, then he would have not opposed the examination

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of such a witness on 15.5.2019. However, that is not the ground in reality.

15. Be that as it may, the fear of the accused that the victim filed this application with a view to delay the trial, can be addressed by requesting the trial Court to complete the trial within a time frame.

16. In view of the above discussions, there is no merit in this petition. The same is accordingly, dismissed. However, keeping in view the observations made herein before, the learned trial Court is requested to conclude the trial on priority basis and preferably on or before 31.12.2019. The accused through counsel is directed to appear before the trial Court on 19.08.2019.

17. The Registry is directed to send a certified copy of the judgment to the trial Court.

All pending application(s), if any, also stand disposed of.

**(Anoop Chitkara)
Judge.**

9th August, 2019_(KS)