

## Paramjeet Singh And Ors Vs State Of Jammu & Kashmir

**Court:** Jammu & Kashmir High Court

**Date of Decision:** April 24, 2019

**Acts Referred:** Code Of Criminal Procedure, 1898 " Section 540, 561A

Code Of Criminal Procedure, 1973 " Section 311, 342

Evidence Act, 1872 " Section 138

**Hon'ble Judges:** Sanjay Kumar Gupta, J

**Bench:** Single Bench

**Advocate:** Ajay Vaid, Aseem Sawhney

**Final Decision:** Dismissed

### Judgement

1. Through the instant petition filed under Section 561-A of the Code of Criminal Procedure (hereinafter for short, Cr.P.C) petitioners seek quashment

of order dated 12.04.2017, passed by 1st Additional Session Judge, Jammu whereby the court below has dismissed the application of the

petitioners/accused for recalling the injured PW Rohit Singh Billoria for his re-examination in terms of Section 540 Cr.P.C.

2. In the petition, it has been stated that injured PW Rohit Singh Billoria filed an application under Section 540 Cr.P.C before the court below stating

therein that he has recorded his statement under the influence of police and relatives and has not deposed the true facts before the court, as such, he

may be recalled so that true facts are brought on record. It is further stated that said application of injured PW Rohit Singh Billoria was dismissed by

the court below on the ground that his statement has already been recorded. It is further stated that after dismissal of the said application,

petitioners/accused also filed an application under Section 540 Cr.P.C before the court below for recalling PW Rohit Singh Billoria, which came to be

dismissed by the court below vide order dated 12.04.2017.

3. The petitioners have challenged the order dated 12.04.2017, passed by 1st Additional Session Judge, Jammu on the following grounds:-

a) That the order impugned is illegal and the Learned Trial Judge has not exercise the jurisdiction which was vested in him. It is settled law that

section 540 Cr.P.C is in two parts. The first part is a discretionary power but the directory power is mandatory. As there is no limitation on the power

of the court arising from the stage to which the trial may have reached, provided the court is bonafide of the opinion that for the just decision of the

case, the step must be taken.

b) That the learned trial judge has dismissed the application of the petitioners on presumption and hypothecation by presuming that the witness has

been influenced by the accused. Otherwise a person of age of 28 years at the time of making statement in the year 2009 while appearing before

session court cannot take plea that he was under the influence and what could be guarantee that he is not under the influence of accused now. The

court has sufficient power u/s165 of the Evidence Act to put any question to the witness and it is the court which has to apprise the testimony to hold

and find out whether his earlier statement on oath or the affidavit command acceptance, because under law evidence of even hostile witness is not

shocked out completely. It is the duty of the court to sift grain out of chaff and his duty every court must discharge to ensure that while innocent is not

punished, the guilty does not escape. The power u/s 540 Cr.PC has to be resorted accordingly.

c. That the order impugned caused serious prejudice to the legal rights of the petitioners. A witness is himself stating that he made his statement under

influence then petitioners deserve a right to cross examine again.Ã¢â‚¬â€

4. I have considered the rival contentions of learned counsel for the parties and gone through the material on record. In support of his contention,

learned counsel for the petitioners relied upon a decision of this Court reported in 2000 Sri LJ 108, Munshi Ram Thappa vs. Rattan Singh and ors.

5. Section 540 Cr.P.C reads as under :

Ã¢â‚¬â€540. 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 essential to the just decision of the case.

6. From bare perusal of above quoted section, it is evident that it consists of two parts. First part gives discretionary power to court in summoning 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.

Second part of section is mandatory and it cast a duty upon the court to call and examine or recall and re-examine any such person if his evidence

appears to it essential to the just decision of the case.

Both the powers have to be exercised with care and judiciously, so that criminal justice seems to have been done to both prosecution and accused.

The foremost consideration for calling or recalling of witness/s is when it appears to court that its calling or recalling is essential to the just decision of

the case.

7. Operative part of the order dated 12.04.2017 passed by 1st Additional Session Judge, Jammu.

“Heard and considered.

Learned counsel for the applicant/accused has vehemently argued that PW Rohit Singh Billoria, who is injured/victim in the case, had moved an

application admitting that his earlier statement was not voluntary deposition about the facts of the case, as such, accused shall be seriously prejudiced,

in case statement of PW Rohit Singh Billoria, is relied upon against the accused. He has vehemently argued that application moved by the defence be

allowed to recall PW Rohit Singh Billoria so that no prejudice is caused to the applicant/accused.

Learned State Counsel, on the other hand, has argued that the application moved by the applicant/accused deserves to be dismissed as the accused

have now won over the injured to screen themselves from the punishment as the said witness had deposed against them. He has vehemently

submitted that application be rejected.

PW 2 Rohit Singh Billoria, aged 28 years and an educated person, was examined by this Court on 14.12.2009 and he had been thoroughly examined

by the prosecution and cross examined by the defence. On 11.04.2016 after a period more than six years he had moved an application for recalling

him to make a true version of the prosecution story. He had stated that he had made that statement under the influence of friends and relatives, as

such, that statement be not taken into consideration and his fresh statement be recorded. This Court vide order dated 26.04.2016 dismissed the

application moved by the witness.

It appears that the instant application has been moved by the witness on the influence of accused only, otherwise a person of the age of 28 years at

the time of appearing before Sessions Court cannot take plea that he was under the influence of friends and what could be the guarantee that he is not

under the influence of accused now. It seems that he has been won over by the accused so that a favorable statement is made in the Court. If such a

person is encouraged then this Court will permit commission of perjury by the witness. The statement of a witness recorded nearer any time to the

occurrence can be said to be honest and factually correct without any improvement or distortion, as at that point of time, the victim of an offence

would not implicate innocent person leaving the real culprits.

Accused/ Applicants have been charged for the commission of an offence of Attempt to Murder by causing serious injuries on his person with the use

of sharp edged weapon and the accused/applicants want to wriggle out from the clutches of the law by adopting a course of making statement of the

victim turning hostile. The application moved by the accused/applicants is, therefore, without any merit and substance. The application is thus

dismissed. Its file shall be consigned to the main case.

Case shall come up for examination of the accused in terms of Section 342 CrPC on 28.04.2017.

8. From bare perusal of facts of case it is evident that statement of star witness PW Rohit Billoria -injured has already been reorded in detail and he

has been cross examined at length by counsel for petitioner/accused on 14.12.2009 .

9. It is not the case of the accused that due to some inadvertence some valuable evidence could not be brought on record or either side failed to ask

some important question which ought to have been asked during examination of P.W.Rohit Billoria, the injured, rather, he has been sought to be called

since that witness wants to retract his previous statement as he has stated that he gave previous statement under pressure and now he wants to state

true facts. Hence, recall of the injured is not for reaching to the just decision of the case, but to allow the injured to retract from his evidence which

amounts to filling up of a lacuna, which has been deprecated by the Apex Court in the case of U.T. of Dadra & Nagar Haveli & Anr. Vs. Fatehsinh

Mohansinh Chauhan (2006) 7 Supreme Court Cases 529. Paragraph 15 reads as follows:

15. A conspectus of authorities referred to above would show that the principle is well settled that 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 of such facts which lead to a just and correct decision of the

case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the

truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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.

The lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of prosecution case as has been held in the

case of Rajendra Prasad Vs. Narcotic Cell through its Officer In Charge, Delhi (1999) 6 Supreme Court Cases 110. Paragraph 12 reads as follows:

12. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any

witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when

the defence highlighted them during final arguments, The power of the court is plenary to summon or even recall any witness at any stage of the case

if the court considers it necessary for a just decision, The steps which the trial court permitted in this case for re-summoning certain witnesses cannot

therefore be spurned down nor frowned at.

10. The exercise of power under section 540 Cr.P.C. should not be allowed as disguise for retrial, or to change the nature of the case against either of

the parties. Hence, the jurisdiction under Section 540 Cr.P.C. must be invoked by the court only in order to meet the ends of justice, for strong and

valid reasons, and not for filling up lacuna, as has been held by the Apex Court in the case of *Natasha Singh Vs. Central Bureau of Investigation*

(State) (2013) 5 Supreme Court Cases 741. Paragraph 15 of the judgment reads as follows:

15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts

and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily,

as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed

only to fill up a lacuna in the case of the prosecution, or of 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 opposite party. Further, the additional evidence must not be received as a disguise for

retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be

tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred

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 great caution and circumspection. The very use of words such as "any Court", "at any stage", or "for any enquiry,

trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the

widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential

to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential

to the just decision of the case.

11. The Apex Court while considering the various decisions dealing with the scope of section 311 Cr.P.C. read with the provision under section 138 of

the Evidence Act laid down certain parameters to be borne in mind by the court while exercising such jurisdiction in Rajaram Prasad Yadav vs. State

of Bihar (2013) 12 SCC 461. Paragraph 17 whereof reads as follows:

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:

17.1 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?

17.2 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.

17.3 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.

17.4 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 just and correct decision of the case

17.5 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.

17.6 The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7 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.

17.8 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.

17.9 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.

17.10 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.

17.11 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.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 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.

17.14 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.

12. The Hon'ble Apex Court in Ratanlal Vs. Prahlad Jat & Ors (2017) 9 SCC 340, has held as under:-

20. In State (NCT of Delhi) v. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402, it was held thus:- "..... Certainly, recall could be permitted if

essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for

ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course

and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to

correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the

opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations

including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to

justify the recall of witnesses already examined".

21. The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad & Ors. v. State of

Rajasthan, (2007) 14 SCC 711, this Court has held as under:- "Before parting, however, we may notice that a contention has been raised by the

learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that

five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure

was rejected by the learned trial Judge by order dated 13-5-1995.

A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where *stricto sensu* the provisions of

Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months

after his deposition is itself pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after

his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was,

therefore, rightly dismissed".

22. Coming to the facts of the present case, PWs 4 and 5 were examined between 29.11.2010 and 11.3.2011. They were cross-examined at length

during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has

recorded a finding that they were not under any pressure while recording their evidence. After a passage of months, they have filed the application for

their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay

in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge,

therefore, was justified in rejecting the application. In our view, High Court was not right in setting aside the said order.

23. In the result, the appeal succeeds and it is accordingly allowed. The order of the High Court in S.B. Criminal 19 Miscellaneous Petition No.1679 of

2012, dated 22.5.2012 is hereby set aside. All pending applications also stand disposed of.

24. We find from the records that after the order of the High Court, PWs 4 and 5 were re-examined before the Trial Court. The Trial Court is

directed to proceed with the matter without taking into consideration the evidence of PWs 4 and 5 recorded after the order of the High Court.

13. Section 311 of Central Criminal Procedure Code is equivalent to Section 540 of J&K Criminal Procedure Code.

14. In the present case, as already discussed the statement of PW Rohit Billoria has been recorded on 14.12.2009 and application under section 540

Cr.P.C has been filed after 8 years. No explanation has been given with regard to delay in filing application. This application of petitioner/accused to

recall of P.W.Rohit Billoria to retract from his initial evidence in the guise of already application filed by him that he gave previous statement under

pressure, cannot come within the ambit of the provision of section 540 of Cr.P.C. or the parameters as laid down by the Apex Court in exercise of



jurisdiction under section 311 Cr.P.C. in the case of Rajaram Prasad Yadav (supra). The law cited by counsel for petitioner is not applicable in view

of law laid down by Apex court.

15. In the circumstances, this Court finds no infirmity in the impugned order. This application is, accordingly, dismissed. Stay if any is vacated.