(34) The seriousness of the respondents can be visualised from the fact that within a fortnight of the telecast of the programme, they had apparently accepted the apology of the petitioner and also the fact that their counsel did not even appear to contest the petition when the matter was taken up for hearing.

(35) On the basis of the above discussion, the petition is accepted the complaint, Annexure P-1, summoning order, Annexure P-5 and all consequential proceedings arising therefrom are quashed and the respondents are burdened with costs of Rs. 10,000 for filing a frivolous complaint. The amount of costs shall be deposited before the Magistrate within a period of two months and the same shall go to the Lawyers' Welfare Fund of the High Court.

R.N.R.

Before Augustine George Masih, J.

BALWINDER SINGH—*Petitioner*

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

Crl. M. No. 22267/M of 2009

18th December, 2009

Code of Criminal Procedure, 1973—S. 311—F.I.R. against respondents for causing death to petitioner registered—Charges u/ss 307/34 I.P.C. framed—Police inadvertently failing to submit statements of eye witness/injured recorded u/s 161 Cr. P.C. with police report—Petitioner seeking to place said statements on record—Trial Court rejecting application u/s 311 Cr. P.C.—Power of Court u/s 311 Cr. P.C.—Exercise of—Discretionary—Function of Criminal Court is transmission of criminal justice and no party can be allowed to take undue benefit or to count on errors committed by others leading to justice being deprived to a party, which deserves a chance to rectify a mistake, which is not of an irreparable nature—Order of trial Court quashed while allowing application u/s 311 Cr. P.C.

Held, that if proper evidence is not adduced or relevant material has not been brought on record, due to inadvertence or oversight, the Court should permit such mistakes to be rectified, which would include an oversight in the management of the prosecution. This mistake or inadvertent omission on the part of the prosecution cannot be treated as punishable lacuna, which cannot be cured by the Court, while exercising its power under Section 311 Cr. P.C. and no party in the trial can be fore-closed from correcting errors aforementioned, which have crept in unintentionally and by oversight.

(Para 18)

Further held, that non-attachment of the copies of the statements of persons recorded under Section 161 Cr. P.C. by the Investigating Officer, who have been duly named as injured and eye witnesses and mentioned in the list of witnesses attached with the report under Section 173 Cr. P.C. the factum of they were injured, has been duly supported by medico legal reports attached with the challan and this fact having not been disputed by respondent No. 1-State and accused/ respondents, lead to only one conclusion that an error has crept in, which was inadvertent, which cannot be termed as irreparable lacuna. In case, the said error is not allowed to be rectified, the justice would be a casualty and the purpose, for which the Criminal Court is established, i.e. to find out the truth, would fail in its duty and quest to find out and to reach the truth. The function of the Criminal Court is transmission of criminal justice and no party can be allowed to take undue benefit or to count on errors committed by others, leading to justice being deprived to a party, which deserves a chance to rectify a mistake, which is not of an irreparable nature.

(Para 20)

Puneet Sharma, Advocate, *for petitioner.*

A. S. Rai, A.A.G. Punjab, *for the respondent 1-State.*

P. S. Khurana, Advocate, *for respondents No. 2 to 5.*

AUGUSTINE GEORGE MASIH, J.

(1) This petition under Section 482 Cr.P.C. has been preferred by the petitioner/complainant, praying for quashing of order dated 28th May, 2009 (Annexure P-6), passed by the learned Sessions Judge, Rupnagar,

vide which application under Section 311 Cr.P.C., preferred by the petitioner/ complainant for permission to place on record the statements recroded by Investigation Officer under Section 161 Cr.P.C. of Gurdev Singh injured/ eye witness and Tejwinder Singh injured, which were inadvertently not filed alongwith the police report submitted under Section 173 Cr.P.C. and to lead additional evidence stand dismissed.

(2) An F.I.R. No. 96 dated 20th August, 2008 under Sections 307/ 326/34 I.P.C., Police Station Chamkaur Sahib, came to be registered against the accused/respondents on a statement made by the petitioner/ complainant Balwinder Singh @ Sangat Singh son of Bishan Singh, which was recroded in Civil Hospital, Chamkaur Sahib, wherein intimation was received on 20th August, 2008 regarding admission of injured Balwinder Singh in the hospital. On 19th August, 2008, injured Balwinder Singh (petitioner/complainant) was declared unfit to make any statement by the Medical Officer. The respondents/accused with an itention to cause death of Balwinder Singh (petitioner/complainant) caused injures on his person, while he was going for a walk on Sirhind Canal in the area of Chamkaur Sahib at about 8.00 P.M. on 19th August, 2008, for the reason that the accused/respondents had tried to outrage the modesty of the daughter of his friend, namely, Sadhu Singh, resident of Mohalla Raiwara, Chamkaur Sahib, as the complainant/petitioner helped him. Gurdev Singh son of Hari Singh, a passerby tried to rescue injured Balwinder Singh on hearing the alarm raised by the petitioner/complainant Balwinder Singh. The accused/ respondents also caused injuries on the person of Gurdev Singh, and, thereafter, accused/respondents threatened the petitioner/complainant Balwinder Singh and eye witness Gurdev Singh that he had been taught a lesson and now they are going to teach a lesson to his other associate Teja @ Tejwinder Singh as they both had objected to accused/respodents, while misbehaving with Gurjinder daughter of Sadhu Singh, who is a friend of petitioner/complainant Balwinder Singh. Thereafter, the assailants went towards the house of Teja @ Tejwinder Singh, who was also way laid in the street at a short distance of less than 100 yds and grievous injuries were caused to Teja @ Tejwinder Singh on the vital parts of the body with a sharp edged weapon. Teja @ Tejwinder Singh was treated in Post Graduate Institute of Medical Education, and Research, Chandigarh, since he had suffered fractures on the vital organs. The Investigating Officer recorded

the statements and collected the M.L.Rs./Medical Case Summaries of the injured Balwinder Singh (petitioner/complainant) and Gurdev Singh (eye witness) in the first case diary itself. On completion of investigation of the case, the Station House Officer, Police Station Chamkaur Sahib, submitted police report under Section 173 Cr.P.C. against the accused/respondents under Sections 307/326/34 I.P.C. before the learned Area Magistrate on 18th November, 2008. One of the accused, namely, Paramjot Singh @ Popan (respondent No. 2 herein) could not be arrested and he was proceeded against under Sections 82/83 Cr.P.C. In the police report under Section 173 Cr.P.C., submitted against the accused/respondents, M.L.Rs. of all the injured alongwith other relevant documents and copy of statements recorded under Section 161 Cr.P.C. were attached in support of report under Section 173 Cr.P.C. Inadvertently, copy of the statements recorded under Section 161 Cr.P.C. of Gurdev Singh and Teja @ Tejwinder Singh, were not attached with the challan report, though, names of these two injured/eye witnesses were mentioned in the list of witnesses at Serial No. 2 and 3 attached with the police report. Accused/respondent No. 2, Paramjot Singh @ Popan surrendered before the learned Trial Court on 18th November, 2009, and he was arrested in the case. Supplementary challan was presented against him and thereafter, the learned Area Magistrate committed the case of the Court of Session, Rupnagar.

(3) The charges were framed on 17th March, 2009 against the accused/respondents under Sections 307/34 I.P.C., but charges under Sections 323/326 I.P.C. were not framed against the accused/respondents, despite grievous injuries on the vital part of Balwinder Singh (petitioner/complainant) and on the person of Gurdev Singh, were found. When the case was fixed for prosecution evidence after framing of charge, the prosecution and the petitioner/complainant realised, at that stage, that the statements of eye witness/injured Gurdev Singh and Teja @ Tejwinder Singh, have inadvertently not been attached with the police report submitted under Section 173 Cr.P.C. by the police.

(4) Accordingly, an application for additional evidence under Section 311 Cr.P.C., was submitted by the petitioner/complainant, wherein it was pleaded that the F.I.R. was registered on the statement of Balwinder Singh (petitioner/complainant). In the said statement, it was specifically mentioned that the injuries upon Gurdev Singh and Tejwinder Singh were inflicted by

the accused/respondents. At the time of presentation of the challan, the names of Gurdev Singh and Tejwinder Singh, were cited in the list of witnesses being eye witnesses/injured and their medico legal reports were also placed on record. However, inadvertently the statements under Section 161 Cr.P.C. during investigation of eye witnesses/injured, namely, Gurdev Singh and Tejwinder Singh, could not be placed with the challan and this fact came to the knowledge of prosecution at the time of examination of the witnesses. The said statements by mistake, are lying in the police file and the prosecution intends to place the said statements on record file. No prejudice would be caused to the accused/respondents by placing the said statements on record, but in case the application is not allowed, the prosecution will suffer irreparable loss.

(5) The said application was opposed by the accused/respondents and the ground taken therein was that the said application was not maintainable and the same has been filed only to fill up the lacuna left by the prosecution. There is no question of inadvertent mistake, as at various stages, the prosecution had taken caution to rectify its mistake, which it fails to do and now at this belated stage, application under Section 311 Cr.P.C. could not be allowed. On consideration of the respective submissions made by the parties and their counsel, the learned Sessions Judge, Rupnagar, proceeded to reject the application preferred by the petitioner/complainant under Section 311 Cr.P.C., *vide* order dated 28th May, 2009 (Annexure P-6), which has led to the filing of the present petition by the petitioner/complainant challenging the same.

(6) Counsel for the petitioner/complainant contends that an inadvertent mistake, which had occurred during the presentation of report under Section 173 Cr.P.C., wherein through oversight, statements of two eye-witnesses/injured, namely, Gurdev Singh son of Hari Singh and Teja @ Tejwinder Singh son of Rattan Singh, could not be attached with the report, although, both of them were cited as eye witnesses/injured and their medico legal reports were attached with the report. He on this basis submits that, as a matter of fact, both the witnesses were injured in the incident. He has referred to the medico legal reports of Gurdev Singh and Teja @ Tejwinder Singh [Annexure P-9 and Annexure P-10 (colly) respectively] to show that grievous injuries were received by both of them at the hands

of the accused/respondents. Their names as injured and eye-witnesses to the incident find mention in the F.I.R. itself, which was recorded on the statement of the petitioner/complainant. He contends that the learned Sessions Judge, Rupnagar, had proceedded to reject the application, merely on technicalities and had totally overlooked the intent and purpose for which Section 311 Cr.P.C. has been incorporated. There is no lacuna in the case of the prosecution, which is being sought to be filled up, as a matter of fact, the mistake is a *bona fide* mistake, which needs to be condoned and rectified, so that justice should not be a casualty and truth should prevail.

(7) In support of his contentions, he relies upon the provisions of Section 311 Cr. P.C. as also the judgment of Hon'ble the Supreme Court in the case of **Rajendra Prasad** *versus* **The Narcotic Cell through its Officer-Incharge, Delhi, (1),** wherein Hon'ble the Supreme Court has held that the lacuna and error are two distinct things and oversignt in the management of prosecution, cannot be tried as a reasonable lacuna and no party in a trial can be fore-closed from correcting errors and inadvertent errors should be permitted to be rectified by the Court, while exercising its power under Section 311 Cr.P.C. He on this basis prays for allowing the present petition and setting aside the order dated 28th May, 2009 (Annexure P-6), passed by the learned Sessions Judge, Rupnagar.

(8) Reply on behalf of respondent No. 1-State has been filed. In the said reply, which is in the form of an affidavit, wherein factum of recording statements of Gurdev Singh son of Hari Singh and Teja @ Tejwinder Sngh, son of Rattan Singh by the Investigating Officer on 20th August, 2008 is admitted. It has further been admitted that inadvertently copies of statements recorded by the Investigating Officer under Section 161 Cr.P.C., were not attached with the report submitted under Section 173 Cr.P.C. It is also admitted that the said statements were available on the police file. The prosecution has fully supported the application, moved under Section 311 Cr.P.C., by the complainant/petitioner. The statements of Gurdev Singh son of Hari Singh and Teja @ Tejwinder Singh, son of Rattan Singh (Annexure P-7 and Annexure P-8) as placed on record in the present petition, as also the copies of the medico legal reports of Gurdev Singh and Tejwinder Singh as Annexure P-9 and Annexure P-10 (colly), are admitted.

(1) 1999 (3) R.C.R. (Criminal) 440

(9) No reply on behalf of accused/respondents No. 2 to 5 has been filed in the Court. On 9th October, 2009, counsel for respondents No. 2 to 5 had made a statement in the Court that he does not want to file reply to the petition and accordingly, the case was adjourned for arguments.

(10) Counsel for respondents No. 2 to 5 submits that the application under Section 311 Cr.P.C., preferred by the petitioner/complainant is not maintainable as it is only the Public Prosecutor, who could prefer an application under Section 311 Cr.P.C. He refers to Section 301 (1)(2) Cr.P.C. and submits that, although, permission may be granted to a counsel to assist and Public Prosecutor, but the Public Prosecutor still holds the reins of the case and right to move an application under Section 311 Cr.P.C. in a case is only available to the Public Prosecutor and none else. In support of his contention, he relies upon the judgment of Kerala High Court in the case of **Somasundaram** *versus* **Chandra Bose, (2).** He contends that by way of application under Section 311 Cr.P.C., the prosecution is trying to fill up the lacuna, which would not be permissible in law. Grave prejudice would be caused to the accused/respondent in case at this stage the present application is allowed. He relies upon the judgment of this Court in the case of **Madanjit Singh** *versus* **Baljit Singh, (3).** in support of his contention that the lacunae of the prosecution in a criminal case cannot be allowed to be filled up under the grab of an application under Section 311 Cr.P.C. In any case, there is no mistake much less inadvertent, while presentation of challan against the accused/respondents and the contention of prosecution cannot be accepted. As per practice and procedure, before presentation of challan in the Court, the same is duly checked by the prosecuting agency and thereafter, it is committed to the Court of Session by the learned Area Magistrate. The prosecution, at that stage, had an opportunity to go through the challan papers. Thereafter, before the Court of Session, when the charge was framed, again an opportunity was available with the prosecution to examine the names of witnesses and their statements recorded under Section 161 Cr.P.C., but the prosecution failed to detect the same and nor did make any effort to take any steps to place the statements of Gurdev Singh and Tejwinder Singh allegedly recorded under Section 161 Cr.P.C. by the Investigating Officer. That apart, the statements having not been attached

(2) 2001 (2) R.C.R. (Criminal) 830
(3) 1997 (2) R.C.R. (Criminal) 808

with the report under Section 173 Cr.P.C. and having not been supplied to the accused/respondents, their rights have been adversely prejudiced and, therefore, the present application had been rightly rejected by the learned Sessions Judge, Rupnagar, *vide* order dated 28th May, 2009 (Annexure P-6). His further submission is that, *vide* order dated 28th May, 2009 (Annexure P-6), the learned Sessions Judge, Rupnagar, had, apart from application under Section 311 Cr.P.C., rejected the application preferred by the petitioner/complainant under Section 216 Cr.P.C. for altering and adding charge. This application has not been challenged by the petitioner/complainant and the same has attained finality and for this reason, the present petition deserves to be dismissed.

(11) I have heard counsel for the parties and with their able assistance have gone through the records of the case.

(12) The facts are not in dispute. The assertions as made in the present petition on the factual aspect by the petitioner/complainant has been admitted by respondent-State on the basis of records. The accused/respondents No. 2 to 5 have preferred not to file reply to the present petition, and, thus, have not contradicted and disputed the factual aspects as asserted by the petitioner. What, therefore, comes out of the factual gamut is that statements of Gurdev Singh son of Hari Singh and Teja @ Tejwinder Singh son of Rattan Singh under Section 161 Cr.P.C. were indeed recorded by the Investigating Officer and are available on the police file. The statements so recorded have been placed on record as Annexure P-7 and Annexure P-8 respectively. The medico legal reports of Gurdev Singh and Teja @ Tejwinder Singh are on records as Annexure P-9 and Annexure P-10 respectively (colly). It is not in dispute that names of Gurdev Singh son of Hari Singh and Teja @ Tejwinder Singh son of Rattan Singh find mention in the list of eye witnesses at Serial No. 2 and 3. The medico legal reports of Gurdev Singh and Teja @ Tejwinder Singh [Annexure P-9 and Annexure P-10 respectively (colly)] support the factum of they were injured as the date of admission of Gurdev Singh at Civil Hosptial, Chamkaur Sahib, is 19th August, 2008 and that of Teja @ Tejwinder Singh is also on 19th August, 2008 at P.G.I. Chandigarh. The statements of Gurdev Singh was recorded by the Investigating Officer at Civil Hospital, Chamkaur

Sahib, on 20th August, 2008 and that of Teja @ Tejwinder Singh in P.G.I. at Chandigarh, on 20th August, 2008 and on the same date, M.L.R./Medical Case Summary of the injured were collected by the Investigating Officer, as per reply filed by respondent No. 1-State. The application under Section 311 Cr.P.C. has been preferred by the petitioner/complainant at the very initiation of the prosecution evidence, when it was realised by the petitioner/complainant and the prosecution that inadvertently statements of Gurdev Singh and Teja @ Tejwinder Singh recroded under Section 161 Cr.P.C. by the Investigating Officer have not been attached with the report under Section 173 Cr.P.C. A perusal of Section 311 Cr.P.C. would clearly indicate that it it a discretionary power of the Court to exercise the same at its discretion and enables it at any stage of inquiry, trial or proceeding under the Code to summon anyone as a witness or examine any person present in the Court or recall or re-examine any person whose evidence has already been recorded. It further provides and rather mandates the criminal court to summon, examine, recall or re-examine any of the persons as mentioned, if his evidence appears to the Criminal Court to be essential for the just decision of the case. This Section gives all powers to the Court without any fetters being put on it with regard to the stage and the manner in which it should be exercised. It is not only the prerogative and the power of the Criminal Court, but also enjoins duty on the Court to seek and arrive at the truth and do the justice.

(13) At this stage Section 311 Cr.P.C. needs to be reproduced, which reads as follow :—

> ***"311. Pôwer to summon material witness, or examine person present,—***
>
> *Any Court may, at any stage of any inquiry, trial or other proceeding under thts Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or 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.".*

(14) This Court, while considering the ambit and scope of Section 311 Cr.P.C. in the case of **Jagdish and another** *versus* **State of Haryana,** Criminal Revision No. 2547 of 2009, decided on 25th September, 2009, has held as follows :—

> *"The section when read as reproduced above, clearly shows that this provision gives ample powers to the Court to recall, summon, or re-examine any person in evidence, if it appears to be essential to the just decision of the case. The powers of the Court are wide enough to exercise its discretion depending upon the facts and circumstances of each case and it is to the satisfaction of the Court and to see that cause of justice should not suffer. The primary aim and object of this Section is to do justice between the parties. If the Court comes to a conclusion that the production of such evidence, which has been sought to be produced taking recourse to Section 311 Cr.P.C., would enable the Court to come to a correct finding, it would be just and reasonable and the Court would be fully justified in permitting the evidence to be produced under this Section. This section does not distinguish and rather allows production of evidence whether docmentary or oral, which the Court feels is necessary for the just decision of the case and no fetters and impediments can be put in exercise of these powers, which has been conferred by the Legislature on the Trial Court. The Court cannot dilute the statutory powers conferred upon the Trial Court, when the Legislature did not intend to do so. Justice should not be the sufferer. The purpose and intent of the trial is to find out the truth and the truth alone should prevail and in its quest to find out and to reach the truth, the Trial Court has been saddled with powers to make all efforts to reach a correct conclusion, which is the truth. No doubt, in the said process, the interest of the parties has to be*

taken care of, but that does not mean that justice should be the casualty. The rights have been conferred under the statute both on the prosecution as well as the accused and when the statute confers certain powers upon the Court, which is primarily in the nature of doing justice and for that it is the satisfaction of the Court as to the essentiality of the evidence, sought to be produced by the parties for the just decision of the case, the same is depending upon the facts of each case."

(15) Thereafter, this Court in the case of **Dr. Gurpreet Kaur** *versus* **Appropriate Authority-cum-Senior Medical Officer, Incharge Sub-Division Hospital, Tehsil Phillaur (Jalandhar),** being CRM M-17027 of 2009, decided on 4th December, 2009, has held as follows :—

"A perusal of the above provision shows that it a discretion provided to the Court, where any inquiry, trial, or other proceedings under the Code is pending, the Court has been given wide powers to recall or re-examine any person already examined, if his evidence appears to the Court to be essential for the just decision of the case. The satisfaction is, therefore, of the Court, which has to decide the matter pending before it. The touchstone for exercise of powers under Section 311 Cr.P.C. is the satisfaction of the Court that the evidence of any person, which comes to its notice, is essential for the just decision of the case. It can at that stage summon any person as witness, examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined. This power, under Section 311 Cr.P.C., can be exercised by the Court at any stage of any inquiry, trial, or other proceedings under the Code of Criminal Procedure. The intention of the Legislature is to empower and enable the Court to come to a correct finding and for that reason,

the Court would be fully justified in permitting production of evidence whether documentary or oral, where the Court feels that the same is necessary for the just decision of the case and no fetters can be put in exercise of these powers of the Court. The cause of justice is paramount and no impediment has, therefore, been intentionally put on the Court by the Legislature to exercise the powers under Section 311 Cr.P.C."

(16) Hon'ble the Supreme Court in the case of **Godrej Pacific Tech, Limited** *versus* **Computer Joint India Limited, (4)** while considering the provisions of Section 311 Cr.P.C. has held as follows :—

"8. 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 of the prosecution and not that 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 wide the power the greater is the necessity for application of judicial mind.

(4) 2008 (3) R.C.R. (Criminal) 897

9. 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 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.

10. The objection of Section 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. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 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** *versus* **State of Maharashtra, [1967(3) S.C.R. 415].**"

(17) Hon'ble the Supreme Court in the case of **Rajendra Prasad** *versus* **The Narcotic Cell through its Officer-Incharge, Delhi, (5)** had an occasion to deal with the case, where after the prosecution evidence was closed and statement of the accused under Section 313 Cr.P.C. also stood recorded, and the defence closed the evidence and case was posted for arguments. At that stage, an application under Section 311 Cr.P.C. was preferred by the prosecution for examining two witnesses, who had already been examined and were to be resummoned for the purpose of proving certain documents for prosecution. The application was filed, where due to inadvertent mistake on the part of the prosecution, the evidence stood closed and the documents were not proved on record. It was basically an error due to oversight in the management of the prosecution. Hon'ble the Supreme Court on consideration of the matter drew a distinction between lacuna in the prosecution and error on the part of the prosecution and has held as follow :—

"7. *It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under section 165 of the Evidence Act by saying that the court could not fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers for witnesses. The adage 'to error is human' is the recognition of the possibility of making mistakes to which*

(5) 1999 (3) R.C.R. (Criminal) 440

humans are prone. A corrollary of any such laches or mistake during the conduct of a case cannot be understood as the lacuna which a court fill up.

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.*

9. *The very same decision* ***Mohan Shamji Soni*** *versus* ***Union of India*** *(supra) which cautioned against filling up lacuna has also laid down the ratio thus :*

"It is therefore clear 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 requirements of justice command this examination of any person which would depend on the facts and circumstances of each case". "

(18) On the basis of above observations made by Hon'ble the Supreme Court, it can be stated that in a given case, if proper evidence is not adduced or relevant material has not been brought on record, due

to inadvertence or oversight, the Court should permit such mistakes to be rectified, which would include an oversight in the management of the prosecution. This mistake or inadvertent omission on the part of the prosecution cannot be treated as punishable lacuna, which cannot be cured by the Court, while exercising its power under Section 311 Cr. P.C. and no party in the trial can be fore-closed from correcting errors aforementioned, which have crept in unintentionally and by oversight.

(19) Hon'ble the Supreme Court in the case of **Ram Avtar** *versus* **State of Haryana (6)** has while considering the purpose of establishing the criminal justice system commented upon the powers of the Presiding Officer of the Criminal Courts. Pare-2 of the said judgement reads as follow:—

> "2. *The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past :*
>
> "*Every Criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right*

(6) AIR 1981 S.C. 1036

given to a Judge is so wide that he may ask any question he pleases, to any form, at any time, of any witness, or the parties about any fact, relevant or irrelevant. Section 172 (2) of the Code of Criminal Procedure enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial". (Sessions Judge ***Nellore*** *versus* ***Intna Ramana Reddy,*** *I.L.R. (1972) Andh. Pra. 683)."*

(20) While applying the abovementioned principles, as have been laid down by the Courts, to the present case, non attachment of the copies of the statements of Gurdev Singh son of Hari Singh and Teja @ Tejwinder Singh son of Rattan Singh recorded under Section 161 Cr. P.C. by the Investigating Officer, who have been duly named as injured and eye witnesses and mentioned in the list of witnesses attached with the report under Section 173 Cr. P. C., the factum of they were injured, has been duly supported by medico legal reports attached with the challan and this fact having not been disputed by respondent No. 1—State and accused/ respondents, lead to only one conclusion that and error has crept in, which was inadvertent, which cannot be termed as irreparable lacuna. In case, the said error is not allowed to be rectified, the justice would be a casualty and the purpose, for which the Criminal Court is established i.e. to find out the truth, would fail in its duty and quest to find out and to reach the truth. The function of the Criminal Court is transmission of criminal justice and no party can be allowed to take undue benefit or to count errors committed by others, leading to justice being deprived to party, which deserves a chance to rectify a mistake, which is not of an irreparable nature.

(21) The judgments relied upon by accused/respondents have no bearing in the light of the observations made by this Court and Hon'ble the Supreme Court, which have been referred to above.

(22) In view of the above, impugned under order dated 28th May, 2009 (Annexure P-6), passed by the learned Sessions Judge, Rupnagar, is hereby set aside and application under Section 311 Cr. P.C., preferred by the petitioner/complainant is allowed. It would not be out of way to observe here that it would be open to the learned Trial Court, if it so comes to a conclusion that provisions under Section 216 Cr. P.C. need to be invoked to alter or add any charge framed against the accused/respondents, which could be consequence of the application under Section 311 Cr. P.C. having been allowed by this Court, by the present order.

R.N.R.

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