

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 8479/2006 & CRL.MA 14359/2006

Date of order : 20th February, 2008

RAMINDER SINGH Petitioner
Through Ms. Anu Narula, Advocate.

versus

STATE Respondent
Through Mr. Pawan Behl, APP for State.
Mr. V.K. Malik, Advocate for complainant.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR

ORDER

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in
Digest? | Yes |

Dr. S. Muralidhar, J (open court)

1. The petitioner is facing trial in FIR No. 797/2002 for the offence under Section 302/323 IPC registered at Police Station Tilak Nagar.

2. After the conclusion of the examination of more than twenty-six prosecution witnesses, the Petitioner, on 24th October 2005, filed an application in the trial court under Section 311 CrPC for recalling and examining PWs 2,3,6,25 and 26.

The grounds urged by the petitioner in this application were as under:

"3. That the counsels have not bothered to apply their best of the legal knowledge in defending the accused and in casual manner conducted

examination/cross-examination of the material witnesses and thereby has jeopardized the innocence of the accused.

4. That the counsel engaged by the applicant/accused has allowed his junior to appear on his behalf and sharpen up their legal practical knowledge and use cases of such gravity as that of applicant to practice upon it.

5. That applicant/accused on most occasions during examination on material witnesses was not even present before the court when these material witness were examined and discharged, not even the copies of the examination of these witnesses were given to the applicant, who is in judicial custody, to analysis what questioning were done to the witnesses deposing against him.

6. That the applicant after persistent demand from his counsel when ultimately obtained the copies was shocked to see that most of the material examination of witnesses were performed by the junior, who even has not been able to effectively cross-examined the witnesses on the material points/improvement made by the witnesses and has not even been confronted with their previous statement.

7. That the applicant was compelled to change his counsel but to his utter dismays his counsel did not bother to read the file handed to him and in a routine manner has conducted the trial and has taken a completely new defence without reading and recalling or re-examining the earlier material witnesses and the defence taken therein.

8. That even the examination of the accused under Section 313 CrP.C. was also not performed in his presence and no question was asked from the applicant/accused.”

3. It is stated that the said application was not taken up on several dates and kept adjourned by the trial court. The trial court ultimately dismissed the said application by an order dated 13th October, 2006. The operative portion of whichr reads as under:

“After hearing all the parties at length and after carefully perusing the

record it appears to me that grounds furnished by the accused are vague one. The witnesses have been cross-examined at length by different counsel of accused on different occasions. I find force in the arguments advanced by the Ld. APP that in case such type of request is allowed at such a final state, there will be no end of the proceedings. In this respect I am being guided by the dictum of Hon'ble Supreme Court in *Hoffman Andreas Vs. Inspector of Customs, Amritsar* 2000 VI (SC) 281 in which it was held that normally, at the stage of final arguments, the Court should be disinclined to open up the closed trial once again barring exceptional circumstances.

Therefore, I am not inclined to open the closed trial once again as the case does not come in the exceptional circumstances. Recalling the witnesses at this stage of trial would tantamount to opening up of a closed trial to the utter disadvantage of the prosecution and it appears to me that accused has moved this application in order to prolong trial. Hence, the application stands dismissed. Put up on 23.10.2006 for further proceedings. Copy of this order be sent to Superintendent Jail for onwards transmission to the accused.”

4. Aggrieved by the aforementioned rejection of the application vide order dated 13th October, 2006 the present petition has been filed under Section 482 CrPC.

5. Ms. Anu Narula, the learned counsel, appearing for the Petitioner relies on the judgments of the Supreme Court in *Mohanlal Shamji Soni v. Union of India* 1991 Supp (1) SCC 271 and *Hoffman Andreas v. Inspector of Customs, Amritsar* 2000(4) Crimes 228(SC) to urge that this was a fit case where in the interests of justice the witness should have been recalled at the behest of the petitioner by the trial court. She reiterated that the counsel engaged for the petitioner had failed to conduct the cross-examination of witnesses properly; that material portions of the evidence available on record were not put to the witness to contradict their statements; the failure of the counsel to elicit these contradictions would preclude the petitioner from putting forth an effective defence in accordance with law at a subsequent stage of the case; that even the change of the counsel did not improve the matter for the petitioner since the new counsel also failed in their duty to

conduct the cross-examination properly and finally that no prejudice would be caused to the State if the application was allowed because the delay, if any, in completion of the trial, would in fact be to the detriment of the accused. She submits that nevertheless since the accused would be even more prejudiced on account of the failure of his counsel to effectively cross-examine the witnesses, the accused does not mind suffering further delay that might be caused in the completion of the trial if the witnesses were recalled.

6. In the first place, it requires to be noticed that scope of Section 311 CrPC does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be pre-judging what according to it are 'material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. No judgment has been pointed out by the learned counsel for the petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.

7. The judgment of the Supreme Court in *Hoffman Andreas* clearly turned on its own facts. There the counsel who was conducting the cross-examination on behalf of the accused expired midway and he was replaced by another counsel who obviously could not obtain instructions as to the line of defence taken by the earlier

counsel. In those circumstances the Court observed: (*Crimes p. 229 para 6*)

“6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development took place during trial i.e. the passing away of the defence Counsel midway of the trial. The Counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new Counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new Counsel thought to have the material witnesses further examined, the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts would afford the opportunity to them in the fairest manner possible.”

Certainly no comparison can be drawn with the above case to the facts here.

8. This Court has examined the entire trial court record and in particular the deposition of the witnesses whose recall is being sought. Lengthy cross-examination has indeed taken place of each of these witnesses by the counsel for the accused. It is, therefore, not possible to accept the submission of the Petitioner that these witnesses should be recalled for the failure of counsel to competently perform their tasks in cross-examining the witnesses. No such value judgment is possible to be made of the work of the counsel by this court or the trial court.

9. In fact as and when questions are put to the witnesses and objections are raised by either counsel for the defence or the prosecution a ruling is given by either

sustaining or overruling such objection by the trial court. Such orders are duly recorded by the trial court in the transcript of evidence itself. There appears to be no such recording of objections or giving of any such ruling on such objections in the transcripts of the depositions of the witnesses in the present case.

10. The judgment in *Mohanlal Shamji Soni* only reinforces the broad proposition that the power under Section 311 CrPC should be exercised in the interests of justice. Although the said law is well settled, there is no occasion as far as the present case is concerned to find fault with the order of the trial court rejecting application under Section 311 CrPC. Recently in *Nisar Khan v. State of Uttaranchal* (2006) 9 SCC 386, the Supreme Court reminded that an application for recall of witnesses filed after a lapse of one year should not be allowed. In the instant case, the examination of some of the witnesses whose recall was sought, was concluded more than one year prior to the filing of the application under Section 311.

11. There is no merit in this application and it is dismissed as such. The interim order stands vacated.

12. A certified copy of this order will be delivered to the trial court within five days from today.

13. Trial court record, if any, be sent back immediately.

S. MURALIDHAR, J.

FEBRUARY 20, 2008

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