

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 23rd January, 2013

+ **CRL. M.C. 249/2013**

JITENDER @ KALIA

..... Petitioner

Through: Mr. Bankim K. Kulshrestha, Adv.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Jasbir Kaur, APP for the State.
ASI Ram Goal, PS Mukherjee Nagar.

+ **CRL. M.C. 253/2013**

JITENDER @ KALIA

..... Petitioner

Through: Mr. Bankim K. Kulshrestha, Adv.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Jasbir Kaur, APP for the State.
ASI Ram Goal, PS Mukherjee Nagar.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

CRL M.A.851/2013 (Exemption) in CRL. M.C. 249/2013

CRL M.A.860/2013 (Exemption) in CRL. M.C. 253/2013

Exemption allowed, subject to all just exceptions.

The Applications are allowed.

CRL. M.C. 249/2013 & CRL. M.C. 253/2013

1. By virtue of these two Petitions under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) the Petitioner invokes the inherent powers of the Court to summon four witnesses, that is, PW-3 Raj Kumar Bhati, PW-4 Sumit Nayyar, PW-6 Janesh Kumar and PW-25 SI Ram Avtar for the purpose of further cross-examination and one Sanjay Sharma who was cited as a prosecution witness, but was not examined, for his examination on the ground that earlier said Sanjay Sharma was son of SI Ram Avtar who was IO of the case. This fact was, however, not disclosed and, therefore, it was essential to cross examine PW-3 Raj Kumar Bhati, PW-4 Sumit Nayyar, PW-6 Janesh Kumar, PW-25 SI Ram Avtar and to examine Sanjay Sharma.
2. The learned Additional Sessions Judge dealt with the contentions at great length and declined to recall PW-3, PW-4, PW-6 and PW-25 and to examine Sanjay Sharma as a court witness. The relevant portion of the impugned order is extracted hereunder:-

“.... Coming first to the case of the witness Sanjay Sharma S/o Ram Avtar (not examined), at the very outset I may note that he has been cited as a witness by the prosecution and thereafter dropped. Being a witness of the prosecution it is their prerogative whether to examine or not to examine this witness and the defence has no right to compel the prosecution into calling or examining a particular witness, though it is always open to the accused to call the said witness cited by the prosecution (and not examined/dropped by the prosecution) as his own witness which the accused has chosen not to do and rather, he has sought to invoke the jurisdiction of this Court vested under Section 311 Cr.P.C. to examine the said witness as a witness of the Court. I may observe that the only aspect on which the accused seeks to examine the said witness Sanjay Sharma, is that he was the son of

the Investigating Officer and is known to other witnesses namely Jainesh, Yogesh Bhati and Inder. In this regard, I may observe that the Investigating Officer Ram Avtar Sharma (PW25) has already been cross-examined on this aspect and he has admitted that Sanjay Sharma is his son who was studying in Satyawati College. He has also been cross-examined on the aspect that he and his sons including Sanjay Sharma were residing in the house of Hari Ram i.e. father of the deceased Anil Badana, which he has denied. This being the background, the aspect of Sanjay Sharma being a student of Satyawati College having already come on record, I do not find any ground to either recall Ram Avtar Sharma in the Court as a witness or Sanjay Sharma as a court witness as it is not for this Court to collect evidence for the defence. Further, the accused has now obtained some replies from the department under the RTI (on legal queries) but this would not in any case entitle him to seek the examination of the witnesses (Ram Avtar Sharma and Sanjay Sharma) on the factual aspects which have already been brought on record during examination of the Investigating Officer.

Coming now to the testimony the witnesses PW3 Raj Kuamr Bhati; PW4 Sumit Nayyar; PW5 Narender Kumar, PW6 Janesh Kumar and PW25 SI Ram Avtar, I may observe that all the said witnesses have already been subjected to a sustained and exhaustive cross-examination as under:-

<i>Sr. No.</i>	<i>Name of the witness</i>	<i>PW No.</i>	<i>Date of examination & cross-examination</i>
1.	Raj Kumar Bhati	PW3	24.5.2001
2.	Sumit Nayyar	PW4	23.7.2001
3.	Janesh Kumar	PW6	18.9.2001
4.	SI Ram Avtar	PW25	4.1.2003

What is it that has prompted the accused now after fourteen years of the incident and ten years of examination of the above witnesses and conclusion of the trial, to move this application? It is writ large that taking advantage of technical ground on which the Judgment/Sentence have been set aside and the file has been remanded back for rehearing, a mischievous attempt has been made by the accused to virtually reopen the trial denovo, which is

nothing but an abuse of the process of law and cannot be permitted.

The provisions of Section 311 Code of Criminal Procedure cannot be invoked for filling up the lacunas in the case of the parties (either prosecution or defence) but give powers to the court to 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. The provisions of Section 311 Cr.P.C. are not limited only for the benefit of the accused and the discretion conferred has to be exercised judiciously only for arriving at the truth and not on the whims and fancies of the litigating parties before the Court. The only attempt of the accused is to delay the finalization and conclusion of the case on one pretext or the other or else there was no reason why after the remand of the case, he had been taking adjournments and then instead of advancing final arguments, this 150 pages application was filed under Section 311 Cr.P.C. It is apparent that under the garb of this application under Section 311 Cr.P.C. the attempt of the applicant/accused who as per the record was a Bad Character (BC) of the area, is only to reopen the trial.

Calling public witnesses to the Court on the smallest of pretext and exposing them to the alleged perpetrator of crime, is nothing sort of harassment to public persons/witnesses which is something which the Courts of Law cannot permit. Unless the Court is satisfied with the bonafides of the applicant and the fact that the examination of witnesses is essential for a just decision of the case, applicant cannot be entertained. In the present case, all the witnesses having been exhaustively cross-examined, no ground had been raised to justify their recall for these examination on the aspects which are relevant and essential to the just decision of the case and this Court cannot permit such an exercise. The applicant being an abuse of the process of law, is hereby dismissed which is however, without prejudice to the rights of the accused to raise the issues so highlighted in the application for the purpose of assessing and evaluating the credibility of the oral testimonies of the various witnesses examined by the prosecution, at the stage of final arguments....”

3. There is no dispute about the proposition of law that under Section 311 Cr.P.C, the Court has wide discretion to summon any witness or recall

any witness, or re-examine any witness at any stage of any inquiry, trial or other proceedings. At the same time, the powers under Section 311 Cr.P.C. have to be exercised only to prevent failure of justice and for a just decision of the case. The main ground taken up by the Petitioner for recalling PW-3 Raj Kumar Bhati, PW-4 Sumit Nayyar, PW-6 Janesh Kumar and PW-25 SI Ram Avtar was that the prosecution had concealed the facts that Sanjay Sharma was son of the IO SI Ram Avtar Sharma.

4. The learned ASJ referred to the testimony of PW-25 SI Ram Avtar Sharma who was cross-examined on this aspect and he admitted that Sanjay Sharma was his son and was studying in Satyawati College. The learned ASJ noted that PW-3 was examined in the Court on 24.05.2001, PW-4 was examined on 23.07.2001, PW-6 was examined on 18.09.2001 and PW-25 was examined on 04.01.2003. Thus, the Petitioner already knew that Sanjay Sharma was son of SI Ram Avtar Sharma . The learned ASJ also observed that the Petitioner had the opportunity to summon Sanjay Sharma in his defence who was cited as a prosecution witness, who was not examined, but that was not done.
5. The Petitioner has not been able to make out a case that further cross-examination of PW-3, PW-4, PW-6 and PW-25 and examination of Sanjay Sharma is in the interest of justice or for just decision of the case. The learned ASJ rightly observed that recalling of these witnesses for the purpose of further cross examination would mean reopening of the whole case. The application under Section 311 Cr.P.C. was rightly dismissed.
6. In the circumstances, I am not inclined to invoke powers of this Court under Section 482 Cr.P.C. to recall the witnesses as prayed for by the Petitioner.

7. The Petitions are dismissed.
8. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

JANUARY 23, 2013

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