

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 15.12.2023

Pronounced on: 22.12.2023

CRM(M) No. 551/2023

Masar Din Alias Machhu
S/O Chatti R/O Village Bakhriwal,
Satya Chack Tehsil and District
Kathua

.....Appellant(s)/Petitioner(s)

Through: Mr. Jagpaul Singh, Advocate.

Vs

UT of J&K
Th. Station House Officer (SHO) Police
Station, Kathua

..... Respondent(s)

Through: Mr. Dewakar Sharma, Dy. AG.

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The present petition has been filed by the petitioner for quashing the order dated 24.05.2023 passed by the court of learned Principal Sessions Judge, Kathua (hereinafter to be referred as 'the trial court') in charge-sheet titled "*State Vs. Masar Din*" whereby the application preferred by the petitioner under Section 311 of Cr. P.C. seeking recall of the Investigating Officer PW-15 Ashwani Kumar for further cross examination was rejected by the learned trial court.
2. The order has been impugned on the ground that when the learned counsel representing the petitioner before the trial court cross-examined the Investigating Officer, he was not well as he was having some health issue i.e. Hypoglycemia, as such, he could not cross examine the said witness properly.

3. Mr. Jagpaul Singh, learned counsel for the petitioner vehemently argued that the counsel representing the petitioner could not properly cross examine the witness as he was suffering from Hypoglycemia, therefore in the interest of justice, the application of the petitioner for recall of the Investigating Officer PW-15 Ashwani Kumar for further cross examination was required to be allowed. Learned counsel for the petitioner relied heavily upon the judgment of in case titled “**Rajendra Prasad vs. Nortoic Cell, New Delhi**” reported as **Cri LJ 3529, Hoffman Andreas vs. Inspector of Customs, reported as (2000)10 SCC 430**.
4. *Per contra*, Mr. Dewakar Sharma, learned Dy. AG appearing on behalf of the respondents argued that the application has rightly been rejected by the learned trial court, more particularly in view of the fact that the learned counsel representing the petitioner before the trial court had cross examined the Investigating Officer in detail. He further submitted that the application seeking recall of the Investigating Officer for further cross examination was filed subsequently only to delay the disposal of the charge-sheet and the reason projected by the petitioner was an afterthought, more particularly when the learned trial court had heard the final arguments in part.
5. Heard and perused the record.
6. A perusal of the application filed by the petitioner reveals that he had sought the recall of the Investigating Officer PW-15 Ashwani Kumar for further cross examination on the ground that the counsel representing the

applicant was not well at the time of cross-examination of the Investigating Officer. There is nothing on record to substantiate that the counsel of the petitioner was not feeling well when he cross examined the Investigating Officer PW-15 Ashwani Kumar. The chief-examination of PW-15 was recorded on 05.09.2022 and he was cross-examined by the learned counsel for the petitioner on same day itself. No such request was made by the learned counsel for the petitioner before the learned trial court that he was not feeling well. But the perusal of the statement of the witness reveals that the cross-examination of the witness mentioned above constitutes of more than three pages. The evidence of the prosecution was closed on 30.09.2022 and the statement of the petitioner was recorded under 342 Cr.P.C on 10.11.2022. On 04.01.2023, on the statement of the petitioner that he did not want to lead any evidence in defence, his right to lead evidence in defence was closed. Thereafter, the arguments were heard in part on the next two dates of hearing. On 27.03.2023, the application was filed by the petitioner under section 311 Cr.P.C. The application under section 311 Cr.P.C as such was filed after more than six months of the cross-examination of the witness and the promptness/delay in filing the application is also one of the considerations for exercising the discretion vested in the trial court for directing recall of the witness for further cross-examination.

7. It is settled law that the accused must be given full opportunity to defend himself during the course of trial and the accused can exercise this right only when he is given proper opportunity to cross-examine the

prosecution witnesses. In the instant case the learned counsel for the petitioner had cross-examined the said witness whole-hog. There is nothing on record to demonstrate that the counsel representing the petitioner before the trial court was not well when he cross-examined the Investigating Officer more particularly, when no such application was made on the next date, which was fixed after the cross-examination of the said witness and even after the closure of the prosecution evidence. Rather, the incriminating evidence was put to the petitioner in terms of Section 342 of Cr. P.C. (Old Code) and he was provided ample opportunity to lead evidence in his defence, but he did not opt to lead any evidence in his defence. It was only when the case was heard in part by the learned trial court that the petitioner filed the application for recall of the Investigating Officer for cross examination on the facts enumerated in annexure A to the application. A perusal of the annexure A appended with the application reveals that the petitioner wants to cross-examine the Investigating Officer afresh and in fact wants to put contradictions in the statements of the witnesses made in the Court and during the investigation to the Investigating Officer-PW-15 Ashwani Kumar. The facts narrated for cross-examination in the annexure A to the application demonstrates that the present application in fact has been filed only to prolong the disposal of the charge-sheet when he had opportunity to cross-examine the witnesses themselves in respect of the inconsistencies between their statements made during investigation before IO and during the trial.

8. In “**Rajaram Prasad Yadav v. State of Bihar**”, 2013(14)461, the Hon’ble Supreme Court has examined the scope of section 311 Cr.P.C and has held as under:

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC 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 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and 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 CrPC 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 CrPC 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 safeguard, 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 CrPC 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.”

9. The judgment in **Rajaram Prasad Yadav v. State of Bihar(supra)** was cited with approval in **State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402** and it was held as under:

“10 It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically

recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

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15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the authorities concerned including the Law Commission and the Bar Council of India.

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27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the

court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. **The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. 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, we do not find any ground to justify the recall of witnesses already examined.”

(Emphasis added)

10. From the above mentioned judicial precedents, it is clear that the trial court has widest discretion to summon any witness or recall any witness, provided the evidence of such is necessary for the just decision of the case in order to ensure that the case is not decided on

the basis of inconclusive and inchoate facts. Such wide and absolute discretion vested in the trial court requires the greatest circumspection on the part of trial court to exercise such power in appropriate cases and not in routine manner.

11. In “**Mir Mohd. Omar v. State of W.B.**”, the Hon’ble Apex Court has held as under:

“16. We equally see no justification for the High Court for giving liberty to the prosecution to file an application for re-examination of PW 34. In fact it will be seen from the operative portion of the impugned order the High Court proceeds on the assumption that PW 34 would be recalled for further examination. Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for.”

(emphasis added)

12. As already noted above, the application for recalling of the witness was filed after 6 months of examination of the witness and the delay in moving the application has not been explained. The non-explanation of delay in the application also tilts the scale against the exercise of discretionary power under section 311 Cr.P.C.

13. In **Ratanlal v. Prahlad Jat, (2017) 9 SCC 340**, the Apex Court has held as under:

“21. The delay in filing the application is one of the important factors which has to be explained in the application. In *Umar Mohammad v. State of Rajasthan* [*Umar Mohammad v. State of Rajasthan*, (2007) 14 SCC], this Court has held as under:

“38. 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 a 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.”

14. The charge-sheet has been pending disposal for the last more than 6 years and was heard in part by the learned trial court. This court does not find that the order impugned suffers from any illegality, which warrants any interference.
15. In view of what has been discussed above, this Court is of the considered view that the present petition is misconceived and the same is, accordingly, **dismissed**.

Jammu
22.12.2023
Sahil Padha

