

Court No. - 86

Case :- APPLICATION U/S 482 No. - 35556 of 2023

Applicant :- Neeraj And Another

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Vivek Kumar Srivastava,Manu Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Rajiv Gupta,J.

1. Heard learned counsel for the applicants, learned AGA for the State and perused the record.
2. By means of this application under Section 482 Cr.P.C., the applicants have challenged the order dated 04.04.2023 passed by Additional Sessions Judge/ Special Judge (POCSO Act), Court No.2, Meerut in Criminal Case No. 202 of 2014 (State Vs. Neeraj and Others), arising out of Case Crime No. 492 of 2014, under Sections 363, 366-Ka, 368, 376 IPC and Sections 3/4, 16/17 of POCSO Act, Police Station Mawana, District Meerut, by which, applicants' application under Section 311 CrPC for recalling the PW-1, PW-2 and PW-4 for their further cross-examination, has been rejected.
3. Brief facts giving rise to this application are that in respect of the incident, an FIR was lodged by Neeraj under Sections 363, 366 IPC on 18.07.2014. The police after concluding the investigation submitted the charge-sheet against the applicants on 08.09.2014. On the basis of which, the applicants were summoned to face trial.
4. After framing of charge against the applicants under Sections 363, 366-Ka, 368, 376 IPC and Sections 3/4, 16/17 of POCSO Act, the applicants did not plead guilty and as such, they were put to trial and witnesses were summoned to adduce their evidence.
5. Consequently, PW-1 appeared before the court below and his examination-in-chief was recorded on 22.06.2018 and thereafter, opportunity to cross-examine the said witness

was given and he was cross-examined on the said date itself. Thereafter, examination-in-chief of PW-2 was recorded on 24.07.2018 and he was cross-examined on the said date itself. Thereafter, examination-in-chief of PW-4 was recorded on 19.12.2019 and he was also cross-examined on the said date itself.

6. Thereafter, statement of remaining witnesses was recorded and they were cross-examined and after conclusion of the cross-examination of the said witnesses, an application under Section 311 CrPC was filed by the applicants on 27.02.2023 stating therein that PW-1, PW-2 and PW-4, who has been already cross-examined, be recalled so that certain other questions may be put to them.

7. Lastly, examination-in-chief of PW-7 victim was recorded on 20.12.2022, in which, the prosecution story was reiterated stating therein that she was forcibly taken away by the accused persons, who committed rape on her. Even, in her statement recorded under Section 164 CrPC, she had reiterated her earlier statement, however thereafter, when the victim appeared for cross-examination, she was not cross-examined and after change of counsel for the applicants on 06.03.2023, she was cross-examined, wherein, she resiled from her earlier statement and did not support the prosecution story at all.

8. In the backdrop of the said circumstances, the instant application under Section 311 CrPC was filed by the applicants for recalling the PW-1, PW-2 and PW-4, who are father, brother and mother of the victim and had fully supported the prosecution story, however, now after winning over the witnesses, the instant application under Section 311 CrPC has been filed for recalling the said witnesses for further cross-examination with oblique motive so that they may also turn hostile and resile from their earlier statement.

9. Thus, it is evident that after about 4 to 5 years, the witnesses PW-1, PW-2 and PW-4, who have already been cross-examined on 22.06.2018, 24.07.2018 and 19.12.2019 respectively, are being recalled on the pretext of further cross-examination so that they may also resile from their

earlier statement and be declared hostile, who may not remember the salient features of the incident and just with an intention to take advantage of the said factum, the present highly belated application under Section 311 CrPC for recalling them has been moved, which application has been rejected by the trial court by the impugned order dated 04.04.2023.

10. Being aggrieved and dissatisfied by the said order, the present application under Section 482 CrPC has been filed.

11. Learned counsel for the applicants has submitted that though PW-1, PW-2 and PW-4 has already been cross-examined on behalf of the applicants but during such cross-examination, certain important questions could not be put to the said witnesses, therefore, they be recalled for further cross-examination under Section 311 CrPC, which application has illegally been rejected by the trial court, as such, the impugned order is bad in law and is liable to be set aside.

12. Per contra, learned AGA has supported the impugned order and has submitted that in the facts and circumstances of the case, the trial court has rightly rejected the said application.

13. To appreciate the controversy in question, Section 311 CrPC is being quoted herein below :-

Section 311 CrPC. 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 to be essential to the just decision of the case.

14. The Hon'ble Apex Court, while interpreting the said provision under Section 311 CrPC in the case reported in **(2017) 9 SCC 340, Ratanlal Vs. Prahlad Jat**, has held as under :-

"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 CrPC are enacted whereunder any court by exercising its discretionary authority at any

stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person, already examined who are expected to be able to throw light upon the matter in dispute.

The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."

In State (NCT of Delhi) Vs. Shiv Kumar Yadav reported in (2016) 2 SCC 402, it was held that "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 v. State of Rajasthan [Umar Mohammad v.State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244] , this Court has held as under: (SCC p. 719, para 38)

"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."

15. Having considered the aforesaid decisions, it is evident that power under Section 311 CrPC should be exercised consciously and not in a routine and casual manner so as to extend any benefit to the accused persons, which is evident in the instant case. From the back drop of the circumstances in the present case, it is evident that after winning over PW-7 victim, who in her cross-examination, resiled from her previous statement and has not supported the prosecution story, an attempt is being made to recall the other witnesses PW-1, PW-2 and PW-4 for further cross-examination, who may also resile from their earlier statement and may not support the prosecution story, which has never been the intent of the provision contained under Section 311 CrPC.

16. It is further germane to point out here that Hon'ble Apex Court in the case of ***Vinod Kumar Vs. State of Punjab reported in (2015) 3 SCC 220*** has clearly held that "*it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial."*

17. Thus, in the backdrop of the said facts and circumstances and in view of the settled law laid down by the Hon'ble Apex Court, I am of the view that the impugned order dated 04.04.2023 do not suffer from any illegality, impropriety or jurisdictional error and do not call for any interference by this Court at this stage.

18. The present application under Section 482 Cr.P.C. is devoid of merit and is accordingly **dismissed**.

Order Date :- 18.10.2023

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