

Court No. - 86

Case :- APPLICATION U/S 482 No. - 36703 of 2023

Applicant :- Anil Kumar @ Kachchey Gupta

Opposite Party :- State of U.P.

Counsel for Applicant :- Veerendra Singh, Pooja Srivastava, Sr. Advocate

Counsel for Opposite Party :- G.A.

Hon'ble Rajiv Gupta, J.

1. Heard learned counsel for the applicant, learned AGA for the State and perused the record.

2. By means of this application under Section 482 Cr.P.C., the applicant has challenged the order dated 04.09.2023 passed by Additional Sessions Judge, Court No. 3/ Special Judge DAA Farrukhabad in Session Trial No. 453 of 1998 (State Vs. Anil Kumar) arising out of Case Crime No. 170 of 1998, under Sections 307, 302, 309 IPC, P.S. Kamalganj, District- Farrukhabad, by which, applicant's application under Section 311 CrPC for recalling the PW-1- Hargovind for his 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 against the applicant, which was registered vide Case Crime No. 170 of 1998, under Sections 307, 302, 309, 506 IPC, P.S. Kamalganj, District- Farrukhabad. On the basis of said FIR, the police thoroughly investigated the matter and submitted charge sheet against the applicant. On the basis of said charge sheet, the trial court has taken cognizance and summoned the applicant to face trial. Consequently, the said case was committed to the court of Session, which was treated as Session Trial No. 453 of 1998. After framing of charge, the applicant did not plead guilty and as such, he was put to trial and witnesses were summoned to adduce their evidence.

4. During the course of trial, Hargovind (P.W.-1) was examined. His examination in-chief was recorded on 8.4.2003 and 31.5.2003.

Thereafter the witness was put to cross examination and he was cross examined at length on 31.5.2006, 7.12.2006, 8.12.2006 and 12.12.2006. Thereafter the trial court remained pending and the applicant instead of proceeding with the trial filed an application dated 12.9.2018 under Section 311 Cr.P.C. stating therein that while cross examining the said witness, certain important questions could not be put to him which are relevant for just decision of the case, therefore, he may again be summoned so that he may put to further cross examination. The trial court rejected the said application by detailed and well reasoned order holding that the questions which are sought to be put to the said witness in further cross examination has already been put to the said witness or they are irrelevant in the facts of the case and the said application has been moved only to delay the trial or to further cross examine him after winning him over.

5. Learned counsel for the applicant has submitted that though P.W.-1 Hargovind has already been examined and cross examined but during such cross examination, certain important questions which are mentioned in the application could not be put to said witness which are necessary for just decision of the case, therefore he be recalled for further cross examination under Section 311 Cr.P.C., however the trial court has illegally rejected the said application, which order is bad in law and is liable to be set aside.

6. Per contra, learned AGA has supported the impugned order and has submitted that the trial in the instant case is of the year 1998 and the said witness has already been examined in the year 2003 till 12.12.2006 and after lapse of 12 years, an application has been filed to recall him for further cross examination, from which it is evident that the applicant is only indulging in dilatory tactics and to fill up the lacuna left in the earlier cross examination.

7. Having considered the rival submission made by the learned counsel for the parties, it would be open to note that the provision in Section 311 Cr.P.C. regarding the power to summon earlier witness or examine any person, which provides as under :-

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.

8. 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."

9. Further, 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."

10. Thus from the aforesaid principle of law laid down by the Hon'ble Apex Court, it is evident that the delay in filing the application is one of the important factors which has to be explained in the application. In the instant case, admittedly the examination in-chief was completed in the year 2003 and thereafter he was put to cross examination on several dates and was extensively cross examined running in 27 pages. Thereafter, again the instant application has been moved for recalling the said said witness for further cross examination on certain points.

11. It is well settled principle of law that the power conferred under Section 311 CrPC should be invoked by the court only to meet the ends of justice. The court has wide power under this Section to even recall witnesses for cross-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witnesses on certain points just to fill up the lacuna was never the intent of the provision contained under Section 311 CrPC. The summoning of witness at belated stage would cause great prejudice to the just decision of the case and should not be allowed.

12. Moreover, the 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."*

13. 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 do not suffer from any illegality, impropriety or jurisdictional error and do not call for any interference by this Court at this stage.

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

Order Date :- 19.10.2023

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