



IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Petition No. 561/2021

1. Ms. Neha Begum,
W/o Abdul Mintu,
 2. Chintu Ali @ Abdul Chintu
S/o Babujan Ali,
 3. Rohan Ali,
S/o Edrish Ali,
 4. Sonu Ali,
S/o Edrish Ali
- All are resident of Chaulkhowa Gharbandi Chuk;
P.S. Dibrugarh, Dist.-Dibrugarh, Assam.

.....Petitioners.

-Versus-

1. The State of Assam,
represented by the Public Prosecutor,
Assam.
2. Salma Begum,
W/o Md. Yusuf Ali,
R/o Chaulkhowa Gharbandi Chuk;
P.S.& Dist. -Dibrugarh, Assam

.....Respondents.

BEFORE

For the Petitioners :- Mr. S. Dutta

For the State respondent :- R.J. Baruah, Addl. P.P.,
Assam.

For the respondent No.2 :- Mr. D. Borah

Date of Hearing : 09.01.2024

Date of Judgment : 19.01.2024

JUDGMENT & ORDER

Heard Mr. S. Dutta, learned counsel for the petitioners. Also heard Mr. R.J. Baruah, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1 and Mr. D. Borah, learned counsel appearing for the respondent No.2.

2. Correctness or otherwise of the order, dated 09.03.2021, passed by the learned Sessions Judge, Dibrugarh, in Sessions Case No.202/2018, registered under Section 303/34 IPC is challenged in this petition under Section 482 of the Code of Criminal Procedure, 1973. It is to be noted here that vide impugned order dated 09.03.2021 the learned Court below had dismissed the petition No. 1869/2021, filed by

the petitioners, under sections 231(2)/311 Cr.P.C. for allowing them to further cross-examine P.W.1, 2, 3, 6, 7 & 8 in the aforementioned case.

3. The background facts leading to filing of the present petition are briefly stated as under:-

“On 21.09.2018, informant Salma Begum had lodged one FIR with the Officer-in-Charge, Dibrugarh P.S. to the effect that on 20.09.2018, at about 12.30 pm persons, namely, Mintu Ali, Sonu Ali, Rohan Ali Rinku Ali, Chintu Ali all are residents of Chawalkhowa Gharbandi Chowk forcefully entered into her house and beaten her mercilessly for which she got grievous injuries on her left hand and head. Upon the said information she had lodged one FIR with the I/C Gabhrupathar Police Out Post, but, the I/C did not take the same seriously. Thereafter, on 21.09.2018, at about 10.30 am while her father Salim Ali went to purchase some household articles with his Scooty then near the house of Rinku Ali all the accused persons named above suddenly attack her father with deadly weapon such as dao and swords as a result of which her father died on the spot.

Upon the said FIR, the Officer-in-Charge, Dibrugarh P.S. had registered a case being Dibrugarh P.S. Case No.1498/2018 under sections 302/34 IPC and thereafter, investigation was carried out, which culminated in submission of charge-sheet, against the persons, namely, Mintu Ali, Sonu Ali, Rohan Ali Rinku Ali, Chintu Ali, Neha Begum and Faizuddin Ahmed. Upon the said charge-sheet the learned Court below has taken cognizance and issued process to the accused persons and on appearance of the

accused persons, the learned Court below has framed charge against the accused under Section 120B/302/201/109/34 IPC. Thereafter, the learned Court below has examined as many as 19 prosecution witnesses. Thereafter, the petitioners have changed their engaged counsel and then on 22.10.2019, the accused persons have filed a petition for further cross-examination of the P.W.1, 2, 3, 6, 7 & 8 on the ground that during trial the petitioners No.2 to 4 all were in jail and their erstwhile counsel had cross-examined the witnesses without consultation of the petitioners and as such there was no proper cross-examination and some material questions were not put and certain facts were not brought on record in the form of cross-examination. But, the learned court below had dismissed the same on the ground that there was no-examination of any witness and as such there can be no provision for the defence to re-cross-examine the prosecution witnesses who were cross-examined earlier and that simply on the change of Advocate and that certain questions were not put in cross-examination, cannot be the ground to allow cross-examination."

4. Being aggrieved, the petitioners have approached this Court by filing the present petition challenging the correctness or otherwise of the impugned order dated 09.03.2021 on the following grounds:-

- (i) That, the impugned order is contrary to the provisions of law;
- (ii) That, the learned court below had ignored the fact that by dismissing the petition it had caused gross injustice to the

petitioners as certain materials question could not be put and certain material facts could not be brought on record;

- (iii) That, on mere suspicions the complainant had falsely implicated the name of the petitioners and detailed cross-examination was required on this point;
- (iv) That, some material questions were not put to the witnesses during cross-examination and new facts, which were not mentioned in the FIR and also in the statement under section 164 Cr.P.C. were brought on record in the examination in chief;
- (v) That, the petitioners were not properly represented by the previous conducting counsel and as such the petitioners have suffered irreparable loss;
- (vi) That, the previous counsel also failed to cross-examine the witnesses on the contradiction arising out of statement before police under sections 161 and 164 Cr.P.C;

5. Mr. Dutta, learned counsel for the petitioner submits that the impugned order dated 09.03.2021, suffers from manifest illegalities. Further Mr. Dutta submits that the learned Court below has failed to invoked the jurisdiction under Section 311 Cr.P.C. and also failed to appreciate the facts that the earlier counsel for the petitioners had failed to cross-examine the witnesses on the contradiction arising out of statement before police under sections 161 and 164 Cr.P.C and also failed to properly represent the petitioners and that some material questions were not put to the witnesses during cross-examination and

new facts, which were not mentioned in the FIR and also in the statement under section 164 Cr.P.C. were brought on record in the examination in chief and on such count recalling of the witnesses mentioned above are very much essential in the interest of justice, and therefore, it is contended to allow the petition.

6. Whereas, Mr. Baruah, learned Additional Public Prosecutor, Assam, submits that the impugned order passed by the learned Court below suffers from no infirmity or illegality and the learned court below had rightly rejected the petition. Mr. Baruah further submits that the learned counsel for the petitioners has effectively cross-examined the witnesses and now it cannot be allowed to fill up the lacuna. Therefore, Mr. Baruah contended to dismiss the petition.

7. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the petition and the documents placed on record and also perused the impugned order dated 09.03.2021, and the scanned copy of the record of learned court below and the relevant provisions of law.

8. The law regarding invoking of jurisdiction under Section 311 Cr.P.C. is well-settled by Hon'ble Supreme Court in catena of decisions. In the case of **Rajaram Prasad Yadav vs. State of Bihar and another** reported in **(2013) 14 SCC 461**, Hon'ble Supreme Court, referring to the earlier decisions, had culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC, and the same are reproduced below:-

"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.

17.10. 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.

17.14. 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."

(emphasis supplied)

- 9. The aforesaid principle is reiterated in the case of **Hoffman Andreas vs. Inspector of Customs, Amritsar** reported in **(2000) 10 SCC 430:-****

"14. ... '6. ... 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 should afford the opportunity to them in the fairest manner possible.' (para 6)"

- 10. Again in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402**, Hon'ble Supreme Court had explained the said authority by opining thus :**

"15. ... 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."

11. In the case of **State of Haryana v. Ram Mehar**, reported in **(2016) 8 SCC 762** Hon'ble Supreme Court had held that:

"39. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

40. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is, 148 in

number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction."

12. The proposition of law laid down in the aforesaid cases for invoking the jurisdiction under Section 311 Cr.P.C. is that the power under the said section is discretionary and it should 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 is a part of fair trial and it is a constitutional goal, as well as a human right. While exercising power the court cannot ignore factual score. Recalling of witnesses on the grounds that the accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown may not be an acceptable grounds in a given factual matrix.

13. Now, advertng to the factual matrix of the case in hand I find that the prosecution side has already examined as many as 19 witnesses out of 29 cited witnesses in the charge sheet. It also appears that the petitioners have effectively cross-examined those witnesses whom they have prays for recalling. The primary grounds, so assigned by the petitioners for recalling of the witnesses are that the petitioners were in jail hazoot during examination of the witnesses and that their erstwhile engaged counsel had failed to obtain necessary instruction so as to effectively cross-examine the witnesses on the contradiction arising out of statement before police under sections 161 and 164 Cr.P.C and also failed to properly represent the petitioners and that some material questions were not put to the witnesses during cross-examination and new facts, which were not mentioned in the FIR, and on such count, according to the petitioners, recalling of the witnesses mentioned above are very much essential in the interest of justice. But, the learned court below, vide impugned order, had rejected the same on the ground that there is no provision for re-cross-examination of the witnesses, who were already cross-examined earlier and that simply on the change of Advocate and that certain questions were not put to the witnesses in cross-examination, cannot be the ground for re-cross-examination.

14. Having tested the finding of the learned court below on the touchstone of the principles of recalling the witnesses as laid down in the case laws discussed herein above, this court is of the view that the impugned order suffers from no infirmity or illegality requiring any interference of this court. As held by the learned court below mere

change of Advocate and that some questions were not put in cross-examination, cannot be the ground for recalling of the witnesses who have already cross-examined by the counsel for the petitioners who was engaged on their choice. Thus, this court find no merits in the grounds assigned by the learned counsel for the petitioners for recalling the witnesses by exercising the discretionary power.

15. In the result, I find this petition devoid of merit and accordingly the same stands dismissed leaving the parties to bear their own costs. Interim order, if any, stands vacated.

JUDGE

Comparing Assistant