

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ **CRL.REV.P. 56/2015**

Date of Reserve: 15.10.2015

Date of decision: 19.10.2015

MOHD.ANISH

..... PETITIONER

Through: Mr.S.K. Sharma, Mr.Puneet Relan,
Mr.Rahul Sharma, Mr.Prayas Aneja &
Mr.Yugant Kuhar, Advs.

versus

STATE (NCT) DELHI

..... RESPONDENT

Through: Ms.Alpana Pandey, APP for the State
ACP Harpal Singh, PS Wazirabad.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The petitioner has put up a challenge to the order dated 15.1.2015 passed by the learned Trial Court in connection with FIR No.399/2009 (PS New Ashok Nagar), whereby the prayer made on behalf of the petitioner (defence) for recall of Smt. Gyan Devi (PW. 12), Baburam (PW. 13) and SI Yoginder Singh (PW 18) under Section 311 of the Code of Criminal Procedure (for short 'Cr.P.C') was rejected without recording any cogent reason for the same.
2. The necessary facts to decide the issue are as hereunder.
3. The petitioner had married Manju @ Shahin (deceased) who was Hindu by birth but had converted to Islam after the marriage. Manju @ Shahin died in her matrimonial home.

4. On the statement of the father of the deceased, viz. Baburam (PW-13), FIR No. 399/2009 (PS New Ashok Nagar) was instituted against the petitioner and his parents for the offences under section 302/498A/34 of the IPC. The petitioner and his parents were charge-sheeted and were put on trial for murder of Manju @ Shahin.

5. The Trial Court convicted the parents of the petitioner under Section 498A and 34 of the IPC whereas the petitioner was convicted for the offences under Section 302/498A/34 of the IPC.

6. A Division Bench of this High Court, in the appeals preferred by the petitioner and his parents (Crl.Appeal No.534/2014 and Crl. Appeal No.777/2014), delivered a judgment on September 24, 2014 whereby the conviction of the parents of the petitioner for the offences under Section 498A and 34 of the IPC was set aside. The conviction of the petitioner under Sections 302/498A/34 IPC was also set aside but his case was remanded to the Trial Court for recording additional evidence of the person in charge of the PCR van who had reached the spot after receiving the information of a woman having been killed as only such evidence would be in proof of the second writing on the PCR logbook.

7. It may be useful here to refer to certain facts appearing in the case against the petitioner and his parents.

8. The information about the death of Manju @ Shahin was received by the police control room on 22.9.2009 at 16:07:03 hours. The aforesaid information was conveyed to the police control room by one Pramod and such information was noted in the PCR log book by

Lady Constable Nimmo. The information which was reduced in writing was that a Hindu girl had been killed by a Muslim man.

9. During trial, Lady Constable Nimmo entered the witness box as prosecution witness No.16 and she proved the PCR form (Exh.PW-16/A). There was further information which was reduced in her writing in the PCR log book viz. the person incharge of PCR van had met the husband of the deceased at his home who informed him that his wife had died because of infection contracted by her after application of mehendi on her hand. The aforesaid entry in the PCR log book was not proved by PW.16.

10. The Appellate Court was of the view that on the evidence led by the prosecution, there was no material to suggest that the petitioner was present in the house when his wife died. Thus, the Appellate Court did not countenance the opinion of the Trial Court that in case of death of a lady in the house when her husband is present, the husband is required to explain specifically about the cause of death or an adverse inference would be drawn. The adverse inference which was drawn by the Trial Court, was not approved of as there was no evidence of the petitioner being present at home.

11. The Appellate Court also took note of the fact that one Mohd. Kalimuddin (PW-3) had testified revealed that he was the Quazi who performed the nikah between the petitioner and the deceased on 5.06.2009. The aforesaid fact namely the nikah of the petitioner with the deceased was further established by the testimony of Gyan Devi (PW-12) and Baburam (PW-13), the parents of the deceased. They

have stated before the Trial Court that the deceased had run away from the house and had married the petitioner. No case was lodged by them in order to save the reputation of the family. However, PW.12 has deposed that she met the deceased after about 10-15 days of the nikah when the deceased is said to have told her that she was being harassed for dowry. PW.12 has also stated that the petitioner asked her to pay Rs.2 Lakhs to Manju in order to avoid any harassment at the hands of the parents-in-law. According to her deposition the harassment for non payment of sufficient dowry continued unabated. A similar statement has been made by the father of the deceased (PW.13).

12. The aforesaid story of the mother meeting the deceased after 10-15 days of the nikah especially when the deceased had run away from the home to marry Anish after converting to Muslim religion was not considered to be trustworthy. Since the marriage was out of an affair between the deceased and the petitioner, it was difficult to believe that there was any demand of dowry before or after the marriage.

13. On the above reasoning, the conviction of the parents of the petitioner and the petitioner was set aside; but, the case of the petitioner was remanded to the Trial Court for recording additional evidence of the person incharge of the PCR van who claimed to have reached the spot after receiving the information about the death of a Hindu woman. The evidence of the person incharge of the PCR van could only be the proof of the second statement in the PCR log book which Lady Constable Nimmo had reduced in writing.

14. Pursuant to the remand of the case of the petitioner before the Trial Court, Head Constable Onkar Prasad (PW.22) was summoned and examined who stated before the Trial Court that he had met the husband of the deceased (petitioner) who told him that the deceased was a Hindu and she had died because of infection contracted by her after application of Mehendi on her hand. He has further stated that the parents and relatives of the deceased were also present at the house where the deceased had died and they also met and told him that the deceased had been killed at the hands of the petitioner and his parents.

15. Since the second part of the statement of PW.22 namely the petitioner and the parents of the deceased having met him at the matrimonial home of the deceased and who informed him that the deceased had been killed, was a totally new fact, and therefore the petitioner/ accused was required to put the same to PWs.12, 13 & 18 (the parents of the deceased and the police officer who first visited the place of occurrence).

16. An application, therefore, was preferred by the petitioner under Section 311 of the Code of Criminal Procedure seeking recall of prosecution witnesses 12, 13 & 18 as the aforesaid witnesses had deposed before the Trial Court that the petitioner was not present at the spot when they reached the place of occurrence. The Trial Court, by the impugned order, has rejected the prayer on the ground that such issues do not warrant recalling of the aforesaid three witnesses and the issue could be dealt with at the time of pronouncing the final judgment.

17. Section 311 of the Code of Criminal Procedure reads as hereunder:-

“311. 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.”

18. In **Jamatraj Kewalji Govani vs. State of Maharashtra**, AIR 1968 SC 178, the Supreme Court has held that Section 311 provides the power, in absolute terms, to be exercised at any stage of the trial to summon a witness or examine one present in the Court or to recall a witness already examined and that it is the duty and obligation of the Court to recall such witnesses if for arriving at a just decision in the case, it is required. It was clarified that if an order of recall is passed without the requirement of a just decision, it would be open to criticism but if the Court's action is supportable as being in aid of a just decision, the action cannot be regarded as exceeding the jurisdiction.

19. In **Mohanlal Shamji Soni vs. Union of India &Anr.**, 1991 Supp (1) SCC 271, the scope and the power under Section 311 of the Code of Criminal Procedure was explained and emphasized. It was held that a witness could be recalled and re-examined if he was in a position to throw light upon a matter in dispute and in the absence of

re-examination of such a witness, any judgment delivered would suffer from the vice of the decision being arrived at on an inchoate, inconclusive and speculative presentation of facts and the ends of justice would definitely be defeated.

20. The ambit and scope of Section 311 of the Cr.P.C, and the circumstances under which a witness could be recalled for re-examination has been enunciated in a line of decisions thereafter. (refer to: Raj Deo Sharma (II) vs. State of Bihar, (1999) 7 SCC 604, U.T. of Dadra and Nagar Haveli & Anr. vs. Fatehsinh Mohansinh Chauhan, (2006) 7 SCC 529, Iddar & Ors. vs. Aabida & Anr., (2007) 11 SCC 211 and P. Sanjeeva Rao vs. State of A.P., (2012) 7 SCC 56).

21. A common thread which runs in all such decisions is, that it should appear to the court that examination of a witness is essential to the just decision of the case and the powers should not be exercised in permitting either of the parties in filling up lacunae in their respective cases. This theory is in accord with the principle of granting fairest opportunity to either of the parties to prove his innocence.

22. In **Hoffman Andreas vs. Inspector of Customs, Amritsar**, (2000) 10 SCC 430, the Supreme Court, while dealing with the provision of Section 311 has said that:

“fairness of the trial is a virtue which is sacrosanct in Indian judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

23. The position of law with regard of exercise of powers under Section 311 of the Cr.P.C, has been very succinctly laid down in **Natasha Singh vs. CBI (State)**, (2013) 5 SCC 741, by the Supreme Court:-

“15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 of the Cr.P.C must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 of the Cr.P.C 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 great caution and circumspection. The very use of words such as “any court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just

decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar [AIR 1958 SC 376 : 1958 Cri LJ 701] , Zahira Habibulla H. Sheikh v. State of Gujarat [(2004) 4 SCC 158 : 2004 SCC (Cri) 999 : AIR 2004 SC 3114] , Zahira Habibullah Sheikh (5)v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8 : AIR 2006 SC 1367] ,Kalyani Baskar v. M.S. Sampooram [(2007) 2 SCC 258 : (2007) 1 SCC (Cri) 577] ,Vijay Kumar v. State of U.P. [(2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240] and Sudevanand v. State [(2012) 3 SCC 387 : (2012) 2 SCC (Cri) 179] .]”

24. After analyzing the entire gamut of case law on the aforesaid issue, the Supreme Court in **Rajaram Prasad Yadav vs. State of Bihar & Anr.**, (2013) 14 SCC 461, has crystallized and shortlisted the

principles which have to be adhered to while dealing with applications under Section 311 of the Cr.P.C.

“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 of the Cr.P.C is noted by the court for a just decision of a case?”

17.2. The exercise of the widest discretionary power under Section 311 of the Cr.P.C 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 of the Cr.P.C 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 of the Cr.P.C 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 of the Cr.P.C 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.”

25. After having examined the law in this regard and applying the same to the facts in the present case, it appears that the Trial Court has completely misdirected himself in rejecting the prayer made by the petitioner, for recall and re-examination of the PWs. 12, 13 and 18.

26. PW.12, Smt. Gyan Devi, Mother of the deceased, has stated before the Trial Court in her examination-in-chief, that:-

“before about one year ago i.e. year 2009 in 6th month i.e. June accused performed nikah with my daughter Manju. After about 10-15 days of nikah my daughter Manju met me on the way when I was going to sabzi mandi. My daughter told me that her in-laws are harassing her... After about my four days of my meeting with Manju, accused Anis met me on the way to market and he asked me to give Rs. 2 Lacs otherwise they will kept harassing my daughter Manju.....On 22.09.2009 somebody informed me at my house that my daughter Manju has been killed. Thereafter I and my husband went to the matrimonial house of Manju where accused and none of his family members found present and my daughter was lying dead on the cot in the hall at ground floor”

27. Similarly, PW.13, the complainant and the father of the deceased, has stated that he was provided information by a boy that his daughter has been killed whereafter, he along with his wife, went to the matrimonial home of his daughter but he did not find anybody in the house.

28. PW.18, SI Yogender Singh, is the police officer who reached the house of the petitioner first on 22.09.2009. He has stated before the Trial Court, that he saw the deceased lying dead on a cot with ligature marks around her neck and it seemed to him to be an unnatural death. On the next day i.e. 23.09.2009, he reached the matrimonial home of the deceased along with the other police officers, where the I.O. prepared the site plan at ground floor, in his presence. While PW.18 and others were on their way to the house of the deceased, Baburam (PW.13) met them. At that time, the police team was informed by a secret informer that the petitioner was present near a mosque in masjid waali gali. On such information the petitioner was arrested from near the mosque referred to above.

29. Thus, from the deposition of the aforesaid three witnesses, it was clearly established that the petitioner was not available at his house on 22.09.2009.

30. In this background, the deposition of PW.22 that the husband and the parents of the deceased were present in the house, who disclosed about the occurrence and stated that the deceased had been killed, it became necessary for the defence/petitioner to put the new circumstance to PWs. 12, 13 and 18. The aforesaid statement of

PW.22 was not available at the time of cross-examination of the aforesaid witnesses. Seen in the aforesaid backdrop, prayer for recall of the aforesaid witnesses could not be dubbed as an attempt to cement the chinks or the latent wedges in the line of defence taken up by the petitioner. It was extremely necessary for such witnesses to be put to the new revelation by PW.22. The additional evidence of PW.22 therefore was required to be tested by cross-examination of PWs. 12,13 and 18 whose evidence are in teeth of what has been stated by PW.22.

31. One of the conditions under which the power under Section 311 of the Cr.P.C could be exercised is the exigency of the situation and to provide fair play to both the parties. A court cannot lose sight of the fact that no party in a trial can be foreclosed from bolstering up his defence or the case and the court should adopt a reasonable view in permitting such moves of the parties.

32. The evidence which has been received through the mouth of PW.22 has undoubtedly changed the nature of the case against the petitioner. Thus, the ends of justice would not be met if an opportunity is not given to the petitioner to cross-examine PWs.12, 13 and 18 after their recall.

33. From a perusal of the order impugned, it appears that the Trial Court while deciding the application of the petitioner under Section 311 of the Cr.P.C, did not advert to the aforesaid considerations and rejected the prayer on a flimsy ground that such issues could be dealt with at the time of pronouncing the final judgment.

34. From the perusal of the order of the Trial Court it further appears that after the rejection of the 311 petition, he has posted the case for arguments. Perhaps the Trial Court completely forgot that such new circumstance is also required to be put to the petitioner (accused) for eliciting his response under Section 313 of the Cr.P.C.

35. Thus, on the aforesaid counts, the order dated 15.01.2015 cannot be sustained in the eyes of law and consequently, the same is quashed.

36. The Trial Court is directed to recall PW.12, 13 and 18 and give reasonable opportunity to the petitioner to cross-examine them on the limited issue of the reception of new facts through the mouth of PW.22. The Trial Court shall take into account the fact that this case has continued for a long time and in the garb of cross-examination of the aforesaid witnesses, the defence ought not to be permitted to linger or delay the conclusion of the trial.

37. The Trial Court shall, on the receipt/production of a copy of this order, issue notice to aforesaid prosecution witnesses for their appearance for being re-examined/cross-examined. The whole process of summoning the aforesaid witnesses and re-examining/cross-examining them should be completed, preferably, within a period of 3 months from the communication of this order.

38. The petition is allowed with the aforesaid observations.

ASHUTOSH KUMAR, J

OCTOBER 19, 2015/k