

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25.08.2015

Date of decision: 28.08.2015

+ **CRL.REV.P. 267/2015**

SIDHARTH JAITLEY

..... Petitioner

Through Mr.S.K. Sethi, Adv.

versus

STATE

..... Respondent

Through Mr.M.P. Singh, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. The petitioner is aggrieved by the order dated 02.02.2015 whereby his prayer to recall PW.28 (Dr.Rajender Singh) under Section 311 of the Cr.P.C. was rejected.

2. The petitioner is an accused in FIR No.747/2007 (PS Prashant Vihar, Delhi) instituted for offence under Sections 364A/302/201/419/420/467 of the IPC. He is alleged to have kidnapped a minor child and thereafter demanded a ransom for the release of such child. The child was later killed even when the ransom amount was paid. The ransom amount and the dead body of the child were recovered at the instance of the petitioner.

3. Out of 72 cited witnesses, 56 witnesses have already been examined by now.

4. An application was preferred on behalf of the petitioner for recalling PW.28, Dr.Rajender Singh, Director CFSL, CBI. It has been contended on behalf of the petitioner that the report given by Dr.Rajender Singh (PW.28) is incorrect and biased. It has further been stated that the voice sample of the petitioner was not collected in accordance with the rules regarding the same and therefore, it was required that such questions be put to the aforesaid witness. Hence, the petitioner had prayed for recall of PW.28 before the Court below.

5. The aforesaid prayer of the petitioner was opposed by the prosecution primarily on the ground that it was a ploy and a clever stratagem to delay the conclusion of the case. It was urged on behalf of the prosecution that Dr.Rajender Singh was cross examined at length on 26.11.2013 and there was no need to recall him again.

6. It appears that Dr.Rajender Singh was examined as PW.28 on 23.04.2012. Thereafter, he was cross examined on 26.11.2013. The cross examination of the aforesaid witness took place after about 18 months from his examination-in-chief.

7. The contention of the petitioner is that PW.28 is a crucial witness for proving his innocence and in order to prove his innocence, there is a requirement of putting him to the questionnaires regarding working procedure manual and guidelines issued by National Accreditation Board for Testing Laboratories (NABL), Central Forensic Science Laboratory (CFSL) and APFSL Hyderabad.

8. The learned Trial Court was of the opinion that such questions, if relevant, could be put to the IO of the case, who was yet to be examined as he only was responsible for taking the voice sample of the petitioner. It considered the prayer of the petitioner as an attempt at filling up the latent wedges and chinks in the case of the defence. The request was, therefore, rejected.

9. The petitioner, through the mechanism of RTI, has collected information from CFSL, Lodhi Road, New Delhi; APFSL, Hyderabad and CFSL, Chandigarh, regarding the procedure for voice sample collection. In all such reports, it has been communicated that hash value is not mandatory for examination of authenticity or comparison of voice recording contained in two CDs, but is only an additional parameter to verify whether the two audio/data files are same and that several factors have to be considered with respect to the tape authentication examination.

10. The learned Trial Court, by order dated 21.04.2009 had permitted the collection of voice sample of the petitioner. PW.28 was cross examined on behalf of the petitioner after 18 months of his examination-in-chief.

11. In that view of the matter, the learned Trial Court was justified in holding that if any question with regard to the process of voice sample collection had to be clarified or put to the witness, the same could be put to the IO of the case who has not yet been examined.

12. Section 311 of the Cr.P.C. reads as under:

“Section : 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.”

13. The scope and object of the section is to enable the Court to find the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts. The aforesaid power has to be exercised judiciously and not in a capricious or an arbitrary manner. Any improper exercise of such power would lead to undesirable results.

14. Times without number, it has been held by the Supreme Court that an attempt at filling up a lacuna in the case of the prosecution or of the defence or to the disadvantage of the accused or to cause such prejudice to the defence of the accused or to give an unfair advantage to the opposite party, has to be nipped in the bud. The provisions of Section 311 of the Cr.P.C. ought not to be seen and treated as a disguise for retrial, or to change the nature of the case against either of the parties.

15. No doubt, fair trial has to be afforded to an accused; nonetheless in the name of fair trial, unnecessary delay in conclusion of a case cannot be permitted.

16. In *Rajaram Prasad Yadav vs. State of Bihar and Anrs.*: (2013) 14 SCC 461, the Supreme Court, after analyzing all relevant decisions over the subject, summarized the conditions and circumstances under which the powers under Section 311 of the Cr.P.C. ought to be exercised.

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. 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 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 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 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 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.”

17. This Court has gone through the deposition of PW.28. He has been put to all conceivable questions with respect to the process adopted by him in analyzing the voice sample. He has been questioned even with respect to the collection of voice sample.

18. This Court is, therefore, of the opinion that no useful purpose would be served in permitting the petitioner to put any such questions regarding the process of voice sampling to PW.28.

19. Considering the aforementioned grounds, no case has been made out by the petitioner for warranting any interference with the order impugned, which refuses the prayer of the petitioner for recall of PW.28.

20. The petition is, therefore, dismissed.

ASHUTOSH KUMAR, J

AUGUST 28, 2015

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