

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ **CRL.REV.P. 345/2015**

Date of Reserve: 09.10.2015

Date of decision: 14.10.2015

VIJAY PETITIONER
Through: Mr.Dinesh Kumar, Adv.

versus

STATE (GOVT OF NCT OF DELHI)..... RESPONDENT
Through: Mr. M.P. Singh, APP.
Insp.Jitender Kr. PS DBG Road.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The petitioner is aggrieved by the order dated 04.02.2015 passed by the learned ASJ, Tis Hazari Courts in Sessions Case No.92/2014 arising out of FIR No.19/2014 (P.S.D.B.Gupta Road) whereby the Trial Court has refused to recall PW-1 (Ram Babu), PW-2 (Bishi Devi) and PW-5 (Thakur Das) on the ground that the witnesses were earlier recalled and reasonable opportunity was given to the petitioner to cross examine them. The Trial Court was of the view that if the aforesaid prosecution witnesses were not cross examined on some of the points on which they were required to be questioned, that by itself would not give any right to the petitioners to have them recalled.

2. It appears from the records that an application under Section 311 of the Cr.P.C. was moved on behalf of the defence seeking recall

of PWs.1 and 2. The Trial Court took note of the fact that they had been cross examined at length on 21.07.2014 and 20.08.2014. Even though there was no ground for allowing the application for recall of the aforesaid witnesses, but on consideration of the fact that both the witnesses were residents of Delhi and that the evidence of prosecution was in progress, the aforesaid witnesses were recalled on payment of cost of Rs.500/- each to be paid to PWs.1 & 2, by order dated 15.10.2014. In the aforesaid order it was made clear that only one opportunity would be given to the defence to cross examine the aforesaid two witnesses regarding the handwriting of the deceased and the writing on the suicide note.

3. Later, again an application came to be filed on behalf of the accused/applicant seeking recall of PWs.1, 2 & 5 for further cross examination. In the aforesaid application, it was averred that some important and vital questions were left to be put to the witnesses. It was also stated that while deposing before the Trial Court, the aforesaid witnesses introduced new facts in their deposition and thereby improved their versions. The aforesaid witnesses were not confronted with their earlier statements made during investigation. It was reiterated that no questions were put to the aforesaid witnesses about their conduct and delay in making such statements. Even suggestions were not put to PW-5 that he had made a false statement.

4. Since the aforesaid persons were the main witnesses of the prosecution, who were not put through a proper questionnaire in their cross examination, essential facts could not be brought to the fore for

the just decision of the case. Under such circumstances, a second prayer for recall of PWs.1 & 2 and first recall of PW-5 was made.

5. The Trial Court, taking note of the fact that on an earlier occasion also opportunity was provided to the accused persons to cross examine PWs.1 & 2, refused to accede to the prayer made by the accused applicant.

6. A particular stress has been laid by the learned counsel appearing for the petitioner about the paramount requirement under Section 311 of the Code of Criminal Procedure to be of a just decision at the trial having the only guiding consideration for recalling or re-examining any witness.

7. In order to appreciate the contention of the petitioner, it is necessary to examine the provisions of Section 311 of the Code of Criminal Procedure.

“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.”

8. It would further be relevant in this context to refer to the provisions/schemes under the Indian Evidence Act for examination and cross-examination of witnesses.

9. Section 138 of the Indian Evidence Act reads as hereunder:-

“138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

10. A joint reading of Section 311 of the Cr.P.C and Section 138 of the Indian Evidence Act would make few things very clear. The words of Section 311 of the Cr.P.C are couched in widest possible parameters and the Trial Court is invested with the powers of summoning a witness or recalling or re-examining any witness who has already been examined if his evidence would appear to be essential for the just decision of the case. Thus the provisions of Section 311 of the Code of Criminal Procedure could only be invoked for achieving a just decision of the case. In other words, the exercise of such power by the Trial Court is subject to the caveat that an already examined person could be summoned for his re-examination if the Court is of the opinion that without such re-examination, no just decision could be made.

11. In **Rajaram Prasad Yadav vs. State of Bihar & Anr**, (2013) 14 SCC 461, the Supreme Court listed certain principles which are

required to be borne in mind by the Courts while exercising powers under Section 311 of the Code of Criminal Procedure. The aforesaid principles are being reproduced below:-

“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.PC 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.PC 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.PC 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.PC 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.”

12. In **A.G vs. Shiv Kumar Yadav & Ors.**, 2015 (9) SCALE 649, the Supreme Court on the issue of lack of proper performance by the defence counsel or his competence, has held that there is no gainsaying that a fair trial is a part of the guarantee under Article 21 of the Constitution. But in the name of fair trial, the judicial system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross examine the prosecution witnesses and to lead evidence in his defence. The object of the provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. Such power has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Since it is not possible to lay down precise situations when such power can be exercised, the Legislature in its wisdom has left the same undefined. Thus, the scope of the exercise of such power depends upon the facts of each case.

13. The Supreme Court disapproved of the order passed by a High Court allowing the prayer under Section 311 of the Cr.P.C made by a newly engaged counsel on the following grounds:-

- (i) *The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;*

- (ii) *No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;*
- (iii) *Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;*
- (iv) *The trial Court as well as the High Court rejected the reasons for recall of the witnesses;*
- (v) *The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;*
- (vi) *Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;*
- (vii) *Mere change of counsel cannot be ground to recall the witnesses;*
- (viii) *There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;*
- (ix) *The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;*
- (x) *There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.*

14. In **Hoffman Andreas vs. Inspector of Customs, Amritsar** (2000) 10 SCC 430, the counsel who was conducting the case was ill and died during the progress of trial. The new counsel sought recall on

the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses.

15. The above observations in Hoffman Andreas case (Supra) and other cases do not provide any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. For the advancement of justice, it is not necessary to take the principles of fair trial to an extremity.

16. In the present case, the reason assigned by the counsel for the defence, for seeking re-examination of the witnesses, is that the material witnesses were not put to relevant questions by the erstwhile counsel conducting the case. It is a matter of normal presumption that when a counsel is permitted to conduct a case, his competence is known to the party engaging him. If, with change of advocate on all occasions, such a prayer would be entertained, it would have serious repercussions on the conclusion of trial and ultimately on the efficacy of the criminal justice system. The witnesses who are sought to be recalled cannot be permitted to face the hardship of appearing in Courts repeatedly. Recalling witnesses on mere asking also delays the expeditious conclusion of a trial. Thus, when the prayer of the petitioner for the recall of the witnesses is not based on any just and adequate grounds, a Court proceeding ought not be permitted to be

degenerated into a weapon of harassment of witnesses and under no score can a trial be halted or delayed for flimsy/inexplicable reasons.

17. In the backdrop of the aforesaid, the order impugned does not appear to be suffering from any illegality or impropriety and the same does not require any interference.

18. The petition is dismissed.

Crl.M.A No.8606 & 8608/2015

1. In view of the petition having been dismissed, no orders are required to be passed in the instant applications.

2. Dismissed as infructuous.

ASHUTOSH KUMAR, J

OCTOBER 14, 2015

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