

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.16583 OF 2016

ORDER:

This petition is filed under Section 482 of Cr.P.C. to quash the order dated 16th November, 2016 passed in CrI.M.P.No.754 of 2016 in S.C.No.624 of 2013 by the Special Sessions Judge-cum-VII Additional Sessions Judge, Mahabubnagar, for the offences punishable under Sections 120-B, 302, 404, 201 and 109 I.P.C., and to recall L.Ws.15 to 18 to examine them as prosecution witnesses on behalf of the respondent-prosecution.

Petitioner herein is the accused and respondent herein is the prosecution.

The respondent-prosecution filed a petition before Sessions Court under Section 311 of Cr.P.C. to examine L.Ws.15 to 18, who were given up by the Public Prosecutor during trial by oversight, since as their evidence is very important on certain aspects, requested to examine them and issue summons to witnesses referred above for that purpose.

The respondent-accused filed counter denying the allegations of the petition while contending that at the stage of arguments, prosecution is not entitled to make such request to summon L.Ws.15 to 18 who were given up knowingly the impact of giving up those witnesses at this stage and apart from that, when the argument was heard in part, the question of summoning witness does not arise and prayed to dismiss the petition.

The Sessions Judge, by an elaborate order assigning reasons, allowed the petition permitting prosecution-respondent herein to examine L.Ws.15 to 18 and issued summons to them after examining as prosecution witnesses before the court. Aggrieved by the order passed by the Sessions Judge, present Criminal Petition is filed.

It is mainly contended that at the stage of argument, witnesses who are given up cannot be summoned by exercising power under Section 311 Cr.P.C. and Sessions Judge passed order mechanically. It is further contended that when the petitioner-accused did not avail opportunity to examine L.Ws.15 to A.18 during trial and given up knowing consequence of such giving up of witnesses, they cannot be summoned at this stage and requested this court to set aside the order under challenge allowing this Criminal Petition.

The learned counsel for the petitioner-accused while reiterating contention urged in the petition placed reliance of unreported judgment of apex court in *STATE OF HARYANA VS. RAM MEHAR AND OTHERS ETC.*, dated 24-8-2016 and another judgment of this Court reported in *SULTAN SALEH BIN OMER vs. VIJAYACHAND SIRIMAL* ⁽¹⁾ in support of his contention. Whereas, Public Prosecutor opposed the petition and placed reliance of a judgment of apex court reported in *RAJENDRA PRASAD Vs. THE*

¹AIR 1966 A.P. 295 (Vol.53, C.95) (1)

NARCOTIC CELL THROUGH ITS OFFICER IN CHARGE, DELHI

(²).

Section 311 of Cr.P.C. permits the court to issue summons to recall witness and re-examine any witness already examined either on the application or on suo-moto the power under Section 311 of Cr.P.C. is totally discretionary and same has to be exercised with great care and caution. Foremost consideration is doing justice.

It is intended to do substantial justice to the party before it, the first part deals with discretion of the court to summon or recall any witness at any stage or any person present in the court or to recall any person and re-examine any witness. Second part is mandatory which compels court to take any of the above steps if new evidence appears to be essential to the just decision of the court, there is no limitation on the power of court to exercise discretion under Section 311 of Cr.P.C. It is not proper to interfere with the order passed while exercising discretionary power under Section 11 of Criminal Procedure Code as held in a decision reported in *ZAHIRA HABIBULLAH SHEIKH AND ANOTHER Vs. STATE OF GUJARAT AND ORS.* (³).where the supreme court in paras 24 and 25 of the judgment discussed about the power of the court to summon witness and held as follows:

“In this context, reference may be made to Section 311 of the Code which reads as follows:

² A.I.R.1999 SC 2292

³ A.I.R.2006 SC 1367

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.

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examine a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

25. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses

examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceedings under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

Thus, the principle laid down in the judgment, the court can exercise such discretionary power under Section 311 Cr.P.C. at any stage of the proceedings and there is no fetter on the exercise of such discretion to summon any witness. Moreover, the main object is to do substantial justice to the parties before the court.

The learned counsel for the petitioner Sri O.Manohar Reddy, contended that the principles laid down by this court while deciding the application under Order 18 Rule 17 of C.P.C. can be applied to the criminal procedure also and when the trial closes the right of party to examine additional witness and adduce additional evidence and when the case is posted for argument, the witness cannot be summoned, a party cannot be examined. But the said principle cannot be applied to the present facts of the case in view of language

used under Section 311 of Cr.P.C. Thus, the power conferred on Criminal court is wider than the power conferred on civil court.

Counsel while contending that court cannot recall witness and when the matter is adjourned for argument, placed reliance on an unreported judgment of apex court in *STATE OF HARYANA VS. RAM MEHAR AND OTHERS ETC.*, dated 24-8-2016 wherein the apex court held as follows at para No.38.

“At this juncture, we think it apt to state that the exercise of power under Section 311 Cr.P.C. can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words “magnanimous approach” and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order, passed by the learned trial judge. If we allow ourselves to say, when the concept fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.”

In view of the law declared by the apex court, court has to exercise discretion to do justice, but in the name of fair trial, the court cannot stretch the power to such an extent to frustrate the very speedy concept of trial.

In *RAJENDRA PRASAD Vs. THE NARCOTIC CELL THROUGH ITS OFFICER IN CHARGE, DELHI* (2nd cited), the Supreme Court earlier laid down certain guidelines held at 11 of its judgment at relevant portion which reads as follows:

"It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage or the trial to summon a witness or examine one present in the Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it."

In decision reported in *AG v. SHIV KUMAR YADAV AND ANR.* (4), the Honourable Supreme Court laid down certain guidelines at para 29 of their judgment, which reads as follows:

"29. We may now sum up our reasons for disapproving the view of the High Court in the present case.

(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;

⁴ AIR 2015 SC 3501

(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."

Thus, the law laid down by the apex court is that the power conferred under Section 311 Cr.P.C. to summon witness who is already examined can be exercised or issue summons to any witness list only to do justice to parties before the court. Here the evidence of prosecution and defence was over and arguments were heard in part and the Public prosecutor reminded about examination of necessary witnesses though they were given up by oversight. But

the ground urged in the petition that L.Ws.15 to 18 were given up by oversight is not satisfactory reason and when the public Prosecutor representing the state being a prosecuting officer, he has to exercise due diligence in prosecuting the case and he cannot give up witnesses and cannot file an application to summon witnesses as and when he wishes. Giving up L.Ws.15 to 18 at one stage, allegedly by oversight and filing an application later i.e., after completion of part of argument would indicate the interest being evinced by the Public Prosecutor for prosecuting the case. Trial court while ordering summons to the witnesses observed at paragraph 7 of the order that even if the witnesses are summoned and examined before the court, no prejudice would be caused as they were not put forth by the prosecution for the first time. But no prejudice alone is not a ground to exercise power under Section 311 Cr.P.C. to summon any witness, on the other hand in Apex court in *AG v. SHIV KUMAR YADAV AND ANR* (4th cited) case, vide guideline No.VIII is of the view that no prejudice is the basis for exercising such power.

The prima consideration of issuing summons to any witness or recalling any witness already examined is to do justice to both parties. But instead of concluding that the examination of witness by issuing summons L.Ws.15 to 18 is to do complete justice, the court concluded that no prejudice will be caused even if they are examined as witness for prosecution since they already listed in the memorandum of evidence. On that count the court can not exercise such discretion under first part of Section 311 of Cr.P.C. It is not the

case of respondent at any stage that materials collected after examination of any witness. In such case, only first part of Section 311 of Cr.P.C. is applicable, in second part the reason assigned by the trial court is not convincing to sustain the order passed by the trial court. Therefore, keeping in mind the rights of the accused and the victim, I find that it is not a fit case to summon the witness after completion of part of argument before trial court in view of specific reason assigned by Public Prosecutor in the petition and the reason recorded by trial court in para 7 of the order of the trial court, therefore, the order passed by the trial court is illegal exercise of its jurisdiction under part 1 of Section 311 of Cr.P.C. which warrant interference by this court in view of apex court guidelines and consequently, this petition in Crl.M.P.No.754 of 2016 is liable to be dismissed, allowing the Criminal Petition.

In the result, this Criminal Petition is allowed setting aside the order impugned.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Dated 15-12-2016.

Dvs.

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Dated 15-12-2016.

Dvs