

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 96 of 2017**

Asmi Raut S/o Shri Pati Raut Aged About 40 Years R/o Tanki
Marouda Market Nevai Bhilai, District Durg, Chhattisgarh.

---- Applicant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station
Nevai, District Durg, Chhattisgarh

....Respondent

For Applicant	:	Mr. R.S. Sharma, Advocate
For State	:	Mr. D.R. Minj, Dy. G.A.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Oral Order****25/01/2017**

Heard.

1. This revision arises out of order dated 29.12.2016 passed in Sessions Trial No.70 of 2016 by the First Additional Sessions Judge, Durg whereby applicant's (accused) application under Section 311 of the Code of Criminal Procedure has been rejected.

2. The accused is being tried for commission of offence under Section 302 of IPC. The prosecution, on various dates, examined number of prosecution witnesses. However, on 26.12.2016, the applicant moved an application under Section 311 Cr.P.C. praying for recall of Chandra Bhushan Tandon (PW1), Rahul Tandon (PW2) and Dr. A.K. Nagdeo (PW12). In the application (Annexure A/2), it was stated that on some important points there was lapse by the earlier counsel while cross examining Chandra Bhushan Tandon (PW1) and Rahul Tandon (PW2), therefore, the two witnesses may be recalled for examination.

3. In so far as A.K. Nagdeo (PW12) is concerned, it was stated in the

application that the doctor has been examined only in respect of a part of the postmortem report. Though the report is in detail with regard to presence of injuries examination of internal parts like heart, liver, vagina and intestine etc., the doctor could not be examined on those aspects which is necessary to find out the time of death.

4. The applicant also sought re-examination of B.C. Barre (PW8) Investigating officer by stating that earlier counsel has failed to examine the witness on certain important aspects.

5. Application was replied by the prosecution by stating that the accused was given full opportunity to cross examine the witnesses; application is vague; that the postmortem report (Ex.P/4) having already been proved by the doctor would require detailed consideration and the application has been filed only to delay the trial. It was also stated in the reply that the witnesses have already made detailed statement and recall of witnesses, will protract the trial.

6. Learned Court below having examined the application of merits concluded that earlier full opportunity of cross-examination was granted. Further observation was that if the defence was inclined to elicit something more from the doctor, who proved postmortem report, the right could be exercised by way of cross-examination and the attempt is only to fill up lacuna. The Court recorded that on such application, if those four witnesses, as prayed by the accused, are recalled, it will result in delay of trial and the application was rejected.

7. Learned counsel for the applicant submits that the applicant is being tried for commission of serious offence which may result in life imprisonment, therefore, in the interest of justice, he may be granted one opportunity to recall the stated witnesses so that he may avail his right to cross-examination of those witnesses. It is further submitted that mere delay by itself, is not a ground to reject the application under Section 311 Cr.P.C. if otherwise, there is full justification for recall of witnesses. Lastly, it is submitted that the power of Courts are of wide amplitude and irrespective of the stage, in larger interest of justice to find out truth and also to afford full opportunity to defend, accused's application under Section 311 Cr.P.C.

ought to be allowed.

8. On the other hand, learned State counsel opposes and submits that the application of the applicant was vague. Full opportunity to cross-examination was granted. Mere change of circumstances, is not a ground to move the application under Section 11 Cr.P.C. as a cloak and device to fill up lacunae and further that in any case, full opportunity have already been directed to recall witnesses will put the clock back resulting in undue delay and conclusion of trial.

9. After hearing learned counsel for the parties, the circumstances of the case and the reasons for which, the prayer for recall of witnesses was made, I am of the opinion that the Court below has not committed any illegality, irregularity or perversity in exercise of his jurisdiction in rejecting petitioner's application nor is it a case of denial of reasonable opportunity of hearing to the accused much less closing the doors for fair trial in quest of truth.

10. Section 311 Cr.P.C. confers wide amplitude of power on the trial Court while trying a criminal case and is extracted herein below :

“**S. 311.** 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.”

11. The aforesaid provision has been examined by the Apex Court time and again and the principles on which the power is to be exercised are too well settled. In the case of **Mohanlal Shamji Soni V. Union of India**,¹ it was propounded that in order to enable the Court to find out the truth and render a just decision the salutary provisions of Section 311 are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the

1 1991 Supp (1) SCC 271

matter in dispute. However word of 'caution' given is that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just justification of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. In the aforesaid decision as also in the case of **Zahira Habibullah Sheikh v. State of Gujarat**,² it has been reiterated that it should not be used for filling up the lacuna by the prosecution or by the defence and that additional evidence should not be received as disguise for a retrial. In the case of **Ramchandra Rao v. State of Karnataka**,³ the Supreme Court cautioned that the Criminal Courts should exercise their available powers such as those available under Section 309, 311 and 258 Cr.P.C. to effectuate the rights to speedy trial. In the case of **Kewal Gupta v. State of H.P.**,⁴ it was held that the object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. The fundamental thing to be seen is whether the Court thinks it necessary in the facts and circumstances of the particular case before it. If this results in what is considered to be the "filling of lacunae", that is purely a subsidiary factor and cannot be taken into consideration.

12. Thus, the object for which the power under Section 311 Cr.P.C. is to be exercised is directed towards a just decision of the case through the process of a fair trial. It is neither intended to allow the parties to fill in a lacunae nor a tool to protract the trial at the whim and caprice of the party to it.

13. If the aforesaid settled legal position is applied to the present case, it is evidentially clear that none of the grounds to exercise judicial discretion in favour of the accused are made out from the application under Section 311 Cr.P.C.

14. In so far as prayer for recall and examination of Chandra Bhushan Tandon (PW1) and Rahul Tandon (PW2) are concerned, all that has been said is that on certain points the witnesses were required to be cross-examined but mistakenly, it could not be done. This is very vague ground to seek indulgence of the Court for recall of witnesses. A witness, who has already been examined and in respect of whom, opportunity was given for cross-examination, which was availed also, order for recall and examination of the witnesses could not be granted on mere asking.

² AIR 2006 SC 1367

³ (2002) 4 SCC 578

⁴ 1991 CRLJ 400

15. Similar is the prayer for recall of B.C. Barre (PW8), Investigating Officer. Here also, only ground stated in the application is that some lapse was committed in cross-examination. This by itself, without anything more, could not be made a basis to invoke jurisdiction under Section 311 of Cr.P.C.

16. In so far as prayer for recall and examination of Dr. A.K. Nagdeo (PW12) is concerned, it has been stated that the doctor was not examined in respect of the entire contents of the postmortem report and in order to decide the time of death re-examination would be necessary. This ground is also far from being sufficient to direct recall of the witness. If on behalf of the accused, during examination-in-chief of Dr. A.K. Nagdeo (PW12), any fact was required to be elicited in respect of the contents of the postmortem report, it was open for the counsel of the accused to put appropriate question to elicit facts with reference to the contents of the postmortem report. The doctor has proved such document, postmortem report and what evidentiary value should be attached to the postmortem report would essentially depend upon proof of its contents by the doctor. The attempt to seek re-examination of the doctor is obviously to fill in a lacunae in the cross examination.

17. Therefore, in the considered opinion of this Court, no case is made out for recall of the witnesses as stated in application under Section 311 Cr.P.C. the Court below has not committed any illegality in rejecting the application. The revision is devoid of merit and is, therefore, dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge