

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.91 OF 2017

Gary Baird .. Petitioner
Versus
State and Anr .. Respondents

Mr. S. Pinto, Advocate for the petitioner.

Mr. S. R. Rivankar, Public Prosecutor for the respondents.

Coram:- C. V. BHADANG, J.

Date:- 22nd June, 2017

ORAL ORDER :

The challenge in this petition is to the order dated 25/04/2017, passed by the learned Special Judge, NDPS Court, Mapusa. By the impugned order, the application filed by the prosecution under Section 311 of Cr.P.C., seeking recall of PW1 Shri K. M. Varshney, Deputy Director of CFSL, Hyderabad, has been allowed.

2. The brief facts are that the petitioner is facing prosecution for the offence punishable under Sections 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short), for having found in possession of 4.140 Kgs of

Methamphatamine. In the trial before the learned Sessions Judge, the Chemical Analyser Shri K. M. Varshney, who was the Assistant Director, CFSL, Hyderabad, was examined as PW1 on 09/02/2015. The trial proceeded further. In November, 2016, an application came to be filed on behalf of the respondents, under Section 311 Cr.P.C., seeking recall of PW1 on the ground that PW1, in his deposition, has not stated the details/ description of the tests conducted by him and chemical data and what he had observed in the specimen samples, in reaching conclusion that contraband was Methamphatamine. The prosecution wanted to recall PW1 to elicit requisite details from him.

3. The application was opposed on behalf of the petitioner on the ground that this is an attempt to fill in lacuna, which is not permissible. It was contended that this will cause prejudice to the petitioner and the witness cannot be recalled within the parameters available under Section 311 of Cr.P.C.

4. The learned Special Court, by the impugned order, has found that recall is necessary for the just decision of the case and no prejudice will be caused to the petitioner, if the witness is recalled for further clarification regarding the test conducted by him. In that view of the matter, the application came to be

allowed. Feeling aggrieved, the petitioner is before this Court.

5. I have heard the learned Counsel for the petitioner and Shri Rivankar, the learned Public Prosecutor for the respondent State. With the assistance of the learned Counsel for the parties, I have gone through the impugned order.

6. It is submitted by the learned Counsel for the petitioner that recall of PW1 is clearly an attempt to fill in lacuna and recall is not necessary for the just decision of the case and on the contrary, it will prejudice the petitioner. The learned Counsel points out that PW1 has already mentioned the nature of the tests conducted by him and no further particulars are necessary or can be called for.

7. On the contrary, it is submitted by the learned Public Prosecutor that PW1, being an expert witness, is expected to state about the details and the nature of the tests conducted and the grounds for his opinion and the conclusion that the substance tested, was contraband Methamphetamine. It is submitted that the recall cannot be said to be an attempt to fill in lacuna. On behalf of the respondent, reliance is placed on Section 293 of Cr.P.C., in order to submit that under subsection (2) of Section

293 of Cr.P.C., the Court may if it thinks fit, summon and examine any such expert as to the subject matter of his report. Reliance is also placed on Section 51 of the Indian Evidence Act and in particular, the illustration annexed thereto, which says that the Expert may give an account of the experiments performed by him for the purpose of forming his opinion. It is, thus, submitted that the account of the experiments performed by the Expert would be a relevant fact within the meaning of Section 51 of the Indian Evidence Act. On behalf of the respondents, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar and Anr**; 2013 0 AIR (SC) 3081, in order to submit that the powers under Section 311 of Cr.P.C. are wide enough and if the Trial Court comes to the conclusion that recall / re-examination of the witness is necessary for the 'just decision of the case', the witness can always be recalled. Reliance is also placed on the Division Bench judgment of this Court in Criminal Appeal No.27/97 (**Deen Khan Mohamad Vs. State of Goa**) dated 24/11/1997, in order to submit that such particulars about the tests conducted, was found to be necessary part of the evidence of the Expert.

8. I have given my anxious consideration to the rival circumstances and the submissions made.

9. Under Section 311 of Cr.P.C., the Court can, at any stage of any enquiry, trial or other proceedings, summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine any person already examined, provided the evidence of such person appears to it to be essential to the just decision of the case. It can, thus, be seen that the powers conferred on the Court by Section 311 of Cr.P.C., are wide enough to recall any witness already examined, albeit on the condition that the Court finds, such recall to be essential to the just decision of the case. The question about the nature, scope and ambit of the powers under Section 311 of Cr.P.C. fell for the consideration of the Hon'ble Supreme Court, in the case of **Rajaram Prasad Yadav** (supra). The Supreme Court, after taking survey of several decisions holding the field, has culled out the principles/ considerations in para 23 of the judgment, which reads as under :

"23. 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:

a) 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?

b) 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 speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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.

d) 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) 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.

h) 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.

i) 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

l) The additional evidence must not be received as a

disguise or to change the nature of the case against any of the party.

m) 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.

n) 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. ”

10. It can, thus, be seen that once the Court arrives at a 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 and where the additional evidence is not sought as a disguise or to change the nature of the evidence of the party, the Court can always recall and re-examine such witness. It is true that the discretion conferred on the Court under Section 311 of Cr.P.C. although wide, is a judicial discretion, which has to be

exercised in the facts and circumstances of each case and in the context of well established principles. The question whether the recall and re-examination of witness is necessary for the just decision of the case, is peculiar to the facts and circumstances of each case.

11. Coming to the present case, earlier PW1 was examined and perusal of his evidence shows that he had mentioned the scientific names of the tests conducted. There are no further particulars forthcoming in the evidence.

12. Under Section 51 of the Indian Evidence Act, the grounds of opinion of a witness are relevant. The illustration to Section 51 would make it clear that the Expert, whose evidence is essential in the nature of an opinion, may give an account of experiments performed by him for the purpose of forming his opinion.

13. It is neither necessary nor appropriate to dwell threadbare on the issue as the trial is still pending before the Trial Court. Suffice it to mention that in the case of **Deen Khan Mohamad**, (supra), the Division Bench of this Court has, *inter alia*, held that such particulars of the tests conducted, are

necessary.

14. Coming to the contention that this is an attempt to fill in lacuna, it is necessary to state that there is a clear distinction between an attempt amounting to correct an inadvertent error and an attempt to fill in lacuna. The distinction although thin, is clear. It is now well settled that a lacuna is something, which is inherent and a latent defect in the prosecution case, which if sought to be cured, would tantamount to an attempt to fill in lacuna. (See case of **Rajendra Prasad Vs. Narcotic Cell**; 1999(6) SCC 110). It can, clearly, be seen that there is a report issued by the Chemical Analyser (after conducting certain tests). In such circumstances, it cannot be said that the bringing of the particulars of such tests on record would amount to curing of a latent or inherent defect in the prosecution case.

15. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity. The learned Special Court has exercised discretion in the context of the facts and circumstances obtaining on record and in the absence of the exercise of discretion being shown to be either arbitrary or perverse, no interference is called for in the exercise of supervisory jurisdiction under Article 227 of the Constitution of

India.

16. In the result, the Writ Petition is hereby dismissed.

SMA

C. V. BHADANG, J.