

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.1504 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, (for short, 'the Code') is filed by the petitioner/ accused assailing the order, dated 20.03.2017, of the learned III Additional Sessions Judge, Tirupati, Chittoor District, passed in CrI.M.P.No.66 of 2017 in S.C.No.125 of 2015.

2. I have heard the submissions of *Sri Suresh Kumar Reddy Kalava*, learned counsel appearing for the petitioner, and of the learned Public Prosecutor appearing for the respondent-State of AP. I have perused the material record.

3. The petitioner/ accused is facing trial in the afore-stated Sessions Case for certain offences including the offence punishable under Section 302 IPC. During the course of trial, the petitioner filed the aforesaid miscellaneous petition under Section 311 of the Code to recall PW9-Dr.D.S Saravanan, who was said to have conducted the post mortem examination on the dead body of the deceased. The said petition was filed with the submissions that one Dr.G.K.Roop Kumar, who had examined and treated the deceased in S.V.R.R. Government General Hospital, Tirupati, was examined as PW10 and that after the examination of the said witness, some material points came to light and that, therefore, it has become necessary to further cross-examine PW9 and that the further examination of the said witness is necessary for arriving at a just decision in the matter and that if the said witness is permitted to be further cross-examined no prejudice would be caused to any of the parties. The said petition was not resisted by the prosecution by filing a counter. On merits and by the order impugned in this revision case, the learned Sessions Judge dismissed the said petition. Therefore, the petitioner/ accused is before this Court.

4. At the hearing, the learned counsel for the petitioner/accused submitted as follows: "The petitioner/accused is facing trial for an offence, which is punishable with capital punishment. The learned counsel cross-examined PW9-Dr.D.S Saravanan, who conducted post mortem examination on the dead body of the deceased. Thereafter, PW10-Dr.G.K. Roop Kumar, who examined and treated the deceased in S.V.R.R. Government General Hospital, Tirupati, was examined. On the examination of the PW10-Dr.Roop Kumar, certain material points have come to light. In that view of the matter, it has become necessary to recall PW9 and further cross-examine him. Further, examination of the said witness is necessary to bring on record certain important aspects, which will be helpful to prove the innocence of the petitioner/accused. The points that may be elicited in the further cross-examination of PW9 may also be helpful for arriving at a just decision in the matter. Therefore, the trial Court ought to have given an opportunity to recall PW9-Dr.D.S Saravanan, who conducted post mortem examination on the dead body of the deceased. Considering the fact that the said Doctor is an official witness, it cannot be said that the said witness is won over and therefore, he is being recalled. Further, he being an official witness, his further cross-examination would not cause any prejudice to the prosecution. The necessity to recall him has arisen subsequently, in view of the fact that certain points have come to light in the examination of PW10, who was examined after the examination of PW9. The observations in the order of the trial Court that the points on which the witness has to be further cross-examined are not disclosed in the petition are untenable. The petitioner/accused cannot be compelled to disclose the points to be elicited in the cross-examination even before the witness is recalled; such a course results in prejudice to the case of the petitioner/accused. The witness is not being recalled to fill up the lacunae, if any, in the defence.

5. The learned Public Prosecutor representing the respondent-State of AP supported the order of the trial Court.

6. There is no need to re-state the facts and submissions and dilate the same any further. The law is fairly well settled that the power to recall any witness, who is already examined, can be exercised only to do complete justice to the parties, but such power cannot be exercised to permit the parties to fill up the lacunae. It is also well settled that what is a lacuna in a matter is pure question pertaining to that matter. It is also well settled that the powers conferred on the Court under the provisions of Section 311 of of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor, which should govern the Court in exercise of powers under Section 311 of the Code, should be whether such material is essential for the just decision of the case.

7. In *Rajaram Prasad Yadav v. State of Bihar*¹ the following propositions are postulated:

"A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed

¹ AIR 2013 SC 3081

calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

Further, after referring to earlier decisions on the point, the Supreme Court culled out following principles to be borne in mind:

- 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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.

8. Thus, the power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. It is needless to state that exercise of such power should be made judiciously and also with extreme care and caution. The Court has to keep in mind not only the aspect of giving a fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed on account of the delay in disposal of the case.

9. In the case on hand, the witness being sought to be recalled, that is, PW9, is a doctor who conducted post mortem examination on the dead body of the deceased. He is an official witness. The reason assigned for recalling him is that after his examination, another doctor, Roop Kumar, PW10, who examined and treated the deceased in S.V.R.R. Government General Hospital was examined by the prosecution and that in the evidence of the said witness, certain important material points have come to light and, therefore, it has become necessary to recall PW9 for further cross-examination. Therefore, based on a subsequent event, the request for recall of PW9 is being made. It is also the case of the petitioner/ accused that the evidence that may be elicited in the further cross-examination of PW9 is essential for a just decision in the matter. Considering the facts of the present case, it cannot be assumed that PW9 is being recalled to cover up the lacunae, if any, in the defence or for any other reasons, which are not valid. In the facts and circumstances of the case

and in the well considered view of the Court, if PW9 is permitted to be recalled for further cross-examination by the petitioner/ accused, the ends of justice would be met as this Court is satisfied that recalling of the said witness for cross-examination is needed to bring the essential material before the trial Court, which may be necessary for a just decision in the case.

10. Viewed thus, this Court finds that the petitioner/ accused made out valid and sufficient grounds to grant his request for recalling PW9 for further cross examination and that, therefore, the order impugned brooks interference.

11. In the result, the Criminal Revision Case is allowed and the impugned order, dated 20.03.2017, passed in Crl.M.P.No.66 of 2017 is set aside and the said petition is allowed and accordingly PW9 is permitted to be recalled for further cross-examination by the petitioner/ accused.

Pending miscellaneous petitions, if any, shall stand closed.

14th June 2017
RAR

M. SEETHARAMA MURTI, J