

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.17266 OF 2016

ORDER:

This Criminal Petition, under Section 482 of Code of Criminal Procedure, 1973 (for short, 'Cr.P.C. '), is filed challenging the order dated 14.12.2016 in CrI.M.P. No.102 of 2016 in S.C. No.246 of 2014 passed by the IX Additional Sessions Judge, Wanaparthy, Mahabubnagar District.

The petitioner filed a petition before the learned Sessions Judge under Section 311 Cr.P.C. to recall P.Ws.1 to 6 for further cross-examination on the ground that the counsel failed to put certain important questions due to oversight and further cross-examination is necessary to arrive at just decision of the case, thereby it is necessary to further cross-examine P.Ws.1 to 6 to prove the innocence of the petitioner, for various offences.

The respondent filed counter denying the material allegations mainly contending that the prosecution witnesses cannot be recalled at this stage, since the witnesses were cross-examined at length, again wanted to cross-examine the witnesses filing the petition to recall the witnesses, who have supported the case of the prosecution. As such the prosecution has an apprehension that the witnesses were won over by the petitioner and in case of recall, they may support the petitioner turning hostile and prayed for dismissal of the petition.

The trial court dismissed the petition placing reliance on the Judgment of the Apex Court in **A.G. v. Shiv Kumar Yadav**¹ holding that failure to put certain questions inadvertently is not a ground to recall the witnesses for further cross-examination.

Aggrieved by the order passed by the learned Sessions Judge, the present criminal petition is filed on various grounds mainly contending that the trial court failed to understand the underlying cardinal principle under Section 311 Cr.P.C. that the substantial evidence is only oral evidence, basing on which either conviction or acquittal would be decided any deficiency and lacuna in the oral evidence of the witnesses may result in wrong judgment, recall of witnesses should be permitted for a better testing the veracity of witnesses and that Section 311 Cr.P.C. permits cross-examination of the witnesses at any stage. But the trial court on misconstruction of Section 311 Cr.P.C. denied to afford opportunity to the petitioner to cross-examine P.Ws.1 to 6. On account of inadvertence of the counsel for the petitioner, the party shall not be put to such substantial loss and prayed to allow the petition.

During hearing, learned counsel for the petitioner reiterated those contentions and requested to allow the criminal petition recalling P.Ws.1 to 6 to do substantial justice to the parties.

The Public Prosecutor for the State of Telangana supported the order passed by the learned Sessions Judge, in all respects, while contending that the witnesses were won over by

¹ AIR 2015 (SC) 3501

the prosecution and apprehending that there is a possibility of turning hostile in the further cross-examination, to impede the prosecution case. In such a case, the prosecution witnesses cannot be recalled.

The main reason for filing the petition to recall the witnesses is only to elicit the truth, as the counsel on record due to inadvertence could not cross-examine the witnesses appropriately. Whereas the Public Prosecutor apprehended that the witnesses were won over after their earlier examination, therefore, the petitioner intentionally filed the petition to elicit something in the cross-examination in his support. The trial court also dismissed the petition on the ground that when the advocate failed to cross-examine the witnesses properly, on that ground the witnesses cannot be recalled while making a passing remark that the reason assigned by the petitioner is not at all a ground now a days, relying on **A.G. v. Shiv Kumar Yadav** (1supra).

The scope of jurisdiction under Section 482 of Cr.P.C. is limited and such jurisdiction has to be exercised sparingly in exceptional circumstances. In the present case, the main dispute is with regard to re-call of P.Ws.1 to 6 for further cross-examination.

A bare look at the allegations made in the petition filed under Section 311 Cr.P.C. before the learned Sessions Judge that the counsel appearing for the petitioner could not cross-examine P.Ws.1 to 6 properly to elicit the truth due to inadvertence. Section 311 Cr.P.C. permits the court to re-

examine any witness, who were already examined, by exercising its power to do complete justice to the parties before the court. Section 311 Cr.P.C. consists of two parts. First part relates to issuance of summons to any person as a witness or re-summon who is already examined; and second part did not confer any discretionary power on the Court since the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to arrive at a just decision of the case. Hence, the first part confers discretion of the Court. As per Section 311 Cr.P.C., a general power is conferred on the Court to summon any person or recall any witness to enable the Court to arrive at a just conclusion, irrespective of whether either of the parties have chosen to summon him or not, but such power should be exercised sparingly. In the case on hand, P.Ws.1 to 6 were already examined and the reason assigned by the petitioner for recalling of witness is that they were not cross-examined properly due to inadvertence by the counsel. Thus, it is clear that the failure on the part of the advocate on record and when the petitioner involved in serious offence, advocate is not expected to be inadvertent in conducting trial of the case i.e. cross-examination of any of the witness, indirectly such an allegation made in the petition would attribute negligence to the advocate on record as he failed to cross-examine the witness appropriately to elicit the truth. But on account of such inadvertence or negligence on the part of advocate on record, the party shall not be put to any hardship, since conviction in a criminal case will have a serious consequence not only on the

accused, but also on the members of the family. Therefore, based on the principles of fair trial, a witness has to be recalled when a petition is filed under Section 311 Cr.P.C. subject to grounds exercising its discretion to do complete justice. No doubt, in **A.G v. Shiv Kumar Yadav** (1supra) the Apex Court laid down certain guidelines at paragraph 29, they are extracted hereunder:

- (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.

In guideline No (ix) it was held that the court can permit recalling of witness since the denial of it would amount to denial

of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings.

In **Rajaram Prasad Yadav v. State of Bihar**², the Apex Court held as follows:

“we find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while

² AIR SC 2013 3081

examining the correctness of the said order passed by the trial Court”.

The principle laid down in the above judgment is not directly applicable to the facts of the present case. But, in the same judgment, the Apex Court pointed out certain circumstances where the Court can exercise power under Section 311 Cr.P.C., which are as follows:

“(i) 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".

In view of the principles laid down in the Judgment referred supra, the exercise of the said power cannot be dubbed as filling up 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 and such exercise of power should be resorted only with the object of finding out that the troubling or obtaining proper principles for such fact which will lead to a just and correct decision in the case. Therefore, while exercising such power under Section 311

Cr.P.C., the court must not only keep in mind the rights of the accused, but also the rights of the victim, though the fair trial is part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for and that the power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised and that the court must also consider the widest power that vested on the courts when it comes to the conclusion on summoning the witnesses or recall and re-examining any witnesses already examined. A reading of Section 311 Cr.P.C. is abundantly clear that the expression “any” has been used as a prefix 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 prefix 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. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore,

a reading of Section 311 CrPC 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 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. 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 me 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 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, a reading of Section 311 Cr.P.C. the court must also concentrate on the rights of the victim and while exercising such power the court must be cautious and avoid causing any hardship to any witness in appearing before the court repeatedly particularly in sensitive cases and heinous crimes. Here the petitioner is facing trial for the offence punishable under Section 302 I.P.C., which is a serious offence punishable with imprisonment for life or capital punishment. In such a case, a

reasonable opportunity has to be afforded to the petitioner, who is facing such trial on the principle of fair trial. The present case falls within the first part of Section 311 Cr.P.C. Therefore, it is purely a discretion of the court either to re-call the witness or not, though it is a serious crime, keeping in mind the ill effects that flow from such failure resulting in conviction.

The apprehension of the Public Prosecutor is that the witnesses were won over, they may speak in favour of the petitioner on account of further cross-examination in recalling and there is every possibility of winning over in certain circumstances. But, at this stage, it is difficult to accept the apprehension in the present case. More over, even if the witnesses turned hostile and speaks in favour of the petitioner after long lapse of time due to re-calling and cross-examining them by the defence counsel, the prosecution may obtain permission from the court and cross-examine his own witness and the court can appreciate the evidence in the light of the settled principles of law and what evidentiary value can be attached to such statement is to be tested with reference to the settled law laid down by various Courts and attach the evidentiary value to such subsequent statement, if supports the case of the defence. Therefore, the apprehension is misplaced and on that ground, the court is not supposed to deny fair trial. The order passed by the trial court is not based on any material and not based on the ground urged by the prosecution in the counter. But the trial court itself invented the ground and dismissed the petition which is not permissible under law.

Moreover the ground raised in the counter by the Public Prosecutor is different from the ground on which the petition was dismissed by the learned Sessions Judge.

Viewed from any angle, the object of Section 311 Cr.P.C. is to afford an opportunity to the parties, more particularly, in serious crimes like the offence punishable under Section 302 I.P.C. and at the same time, the witnesses cannot be put to hardship recalling them as a witness time and again particularly in sensitive cases. Here the offence allegedly committed by the petitioner punishable under Section 302 I.P.C. and its consequent punishments are drastic.

Therefore, I deem it appropriate to afford an opportunity to recall the witnesses fixing a specific date for further cross-examination, on one day, subject to bearing expenses for summoning the witnesses by the petitioner himself, and the learned Sessions Judge is at liberty to appreciate the evidence based on settled principles of law, even if the witnesses supports the case of defence in the further cross-examination, on their recall.

In the result, the criminal petition is allowed, setting aside the order dated 14.12.2016 in CrI.M.P. No.102 of 2016 in S.C. No.246 of 2014 passed by the IX Additional Sessions Judge, Wanaparthi, Mahabubnagar District, directing the learned Sessions Judge to recall P.Ws.1 to 6 for further cross-examination fixing a specific date, subject to bearing expenses for summoning the witnesses by the petitioner himself, and the learned Sessions Judge is at liberty to appreciate the evidence

- 13 -

based on settled principles of law, even if the witnesses supports the case of defence in the further cross-examination, on their recall. In the event of failure to cross-examine P.Ws.1 to 6 on the date fixed by the court, the court can proceed with the matter, in accordance with law, closing the evidence of prosecution.

Miscellaneous petitions, if any, pending in this criminal petitions shall stand closed.

M. SATYANARAYANA MURTHY, J

30-01-2017
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