

HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CRL.R.C.Nos.2091 and 2092 of 2017

COMMON ORDERS:

In these two revisions, under Sections 397 and 401 of the Code of Criminal procedure, 1973, (Code', for brevity) filed by the petitioners/accused the challenge is to the two separate orders, dated 07.07.2017, of the learned Sessions Judge, Chittoor, whereby the two miscellaneous petitions filed by the Complainant/ State for receiving documents and recalling PWs 2 and 14 were allowed.

2. I have heard the submissions of Sri D. Purna Chandra Reddy, learned senior counsel appearing for the petitioners, and of the learned Public Prosecutor, State of A.P., representing the respondent-State.

3. The facts and the case of the complainant, which are necessary to be stated as a preface to this order, in brief, are as follows: "The accused are facing trial for the offences punishable under sections 364A, 323, 384, 506 read with 34 of IPC. According to the case of the prosecution, the accused kidnapped PW1, on 18.05.2013, at about 12 noon from the premises of the Syndicate Bank, Tiruchanur Branch. At trial PWs 1 to 14 were examined. The case is posed for the examination of I.O-LW16.

During the course of investigation, LW15-the then Sub Inspector of Police, who was examined as PW14, seized CC Camera Footage, dated 18.05.2013, between 11.00 am and 01.00 pm from the said Branch of Syndicate Bank by addressing a letter to the branch manager-PW2. The manager of the branch furnished the said CC Camera Footage to the said officer along with the letter, dated 20.05.2013. But, PW-15, the I.O. who had filed the charge sheet has not produced the same along with the charge sheet. The said evidence is very important to prove the charges against the accused. In the above said circumstances it has become necessary to file the petitions to receive the said documents viz., CC Camera Footage and correspondence on file and recall PWs.2 and 14 to adduce necessary and relevant evidence related to the said documents. Hence, the petitions are filed.”

4. Per contra the case of the accused is this: “Admittedly the I.O. had not filed the subject documents along with the charge sheet. Copies of the same were not furnished to the accused at the inception. Now the prosecution came forward with these petitions. None of the Bank Officials so far examined spoke about handing over of the subject documents to the police officer and no seizure report or mahazar was prepared showing the seizure of the CC Camera footage. No such document evidencing seizure was filed so far into Court.

When electronic evidence is produced, the prosecution has to satisfy the requirements of the Indian Evidence Act and the provisions of the Information Technology Act. The said requirements are not fulfilled. The petitions may be dismissed.”

5. The Court of Session allowed both the petitions. Hence, the accused filed these revision cases.

6. Learned counsel made submissions in line with the pleaded cases of the parties. Learned counsel for the accused mainly contended that the additional documents are not relevant and necessary and that the present attempt of the prosecution is to fill up the lacunae in the prosecution case at the fag end of the trial and that there is no seizure report or panchanaarna evidencing the seizure of the CC camera footage and that so far no witness spoke about the furnishing of the same by the Bank to the police officer and that none of the legal requirements for admitting electronic evidence are satisfied and that the CC camera footage is inadmissible in evidence and that the proposed evidence is being produced as an afterthought and that the provision of law under Section 230 of the Code has no application to the case facts and that the orders allowing the applications of the prosecution caused great prejudice to the accused and that the reasons in the impugned orders are not valid and sustainable and that the

orders impugned are liable to be set aside.

7. Learned Public Prosecutor having supported the orders of the Court below contended as follows: "In the charge sheet there is a clear mention that during the course of investigation it is revealed from the CC camera footages that seven persons entered into the Bank and that out of them six persons are accused and that another was a customer of the bank. The accused are thus aware of the said aspect that there is electronic evidence in the form of CC camera footage. The said averment in the charge sheet supports the requests of the prosecution. For the inadvertence or a procedural or other lapse on the part of the I.O., who filed the charge sheet, the opportunity to adduce relevant evidence cannot be denied. As per settled law, the necessary requirement of production of certificate etcetera can be complied with at any stage and even before the electronic document is tendered in evidence. If the crucial piece of evidence collected from an independent source is not permitted to be brought on record, the prosecution suffers serious loss. It is in the interests of justice to receive the documents on file and give an opportunity to examine the necessary witnesses by recalling them as sought for by the complainant. The accused can cross examine the witnesses on all aspects of their defence and hence, no prejudice would be caused to them. Further, they always have the liberty to raise all their contentions

before the trial Court. There is no merit in the revisions. The well-reasoned orders of the Court of Session do not call for interference.”

8. I have given earnest consideration to the facts and submissions.

9. The facts and submissions are already stated supra in detail and there is no need to dilate the same. Be it re-noted that the accused are facing trial for the offences punishable under sections 364A, 323, 384, 506 read with 34 of IPC. According to the case of the prosecution, the accused kidnapped PW1, on 18.05.2013, at about 12 noon from the premises of the Syndicate Bank, Tiruchanur Branch. At trial PWs 1 to 14 were examined. When the trial is at the stage of examining the Investigating Officer, the prosecution now intends to file C.C. Camera footage received from the branch concerned of the bank along with the relevant correspondence to substantiate its case and to enable it to prove its case as required under facts and law. The accused contend that the belated attempt to file the above documents and recall PWs. 2 and 14 to adduce evidence related to the said documents is intended to fill up the lacunae in the prosecution evidence and that no seizure panchnama/mahazar is also filed evidencing the alleged seizure of the CC camera footage and that the witnesses so far examined not stated about the

seizing of such document and that if at this belated stage the prosecution is permitted to file the above said documents and adduce evidence, great prejudice would be caused to the accused. What is to be noted is that the prosecution is not for the first time saying that there is CC camera footage. As already noted, in the charge sheet there is a clear mention that during the course of investigation it is revealed from the CC camera footages that seven persons entered into the branch concerned of the Bank and that out of them six persons are accused and that another was a customer of the bank. The accused are thus aware of the said aspect that there is electronic evidence in the form of CC camera footage. Hence, the existence of such a document is not a surprise and they cannot be heard to say that such evidence is being produced like a bolt from the blue. Though it is borne out by record that the furnishing of the camera footage is not elicited during the evidence of PW2, the branch manager, however, it is evident from the record that PW14 has already deposed about the receipt of CC camera footage in the form of CD from PW2. The case of the prosecution is that the police officer concerned seized the said CD on furnishing of the same after correspondence with the bank officers and that the I.O. who filed the charge sheet, has not filed the said document and correspondence into Court as the same were misplaced in the police station at the time of filing of the charge sheet and that

the same are now being filed as the same are now traced. Merely because there is a lapse on the part of the I.O. and he failed to file the above documents along with the charge sheet, the said documents need not be refused to be received on file. On the contrary, if the documents are received on file and are permitted to be marked only on the prosecution satisfying the necessary legal requirements and liberty is reserved to the accused to raise all their contentions including the objection with regard to admissibility of the electronic evidence and further liberty is also reserved to them to cross examine the witnesses being proposed to be recalled on all aspects, in case the trial Court permits the documents to be exhibited, the said course would meet the ends of justice and does not cause any prejudice whatsoever to the accused.

10. Further, it is apt to refer to the ratio in the decision in **Rajaram Prasad Yadav v. State of Bihar**¹, wherein 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",

¹ AIR 2013 SC 3081

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 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 reexamination 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 which are 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.

11. 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 prosecution but also the need for ensuring that the persons accused of the crime are not unduly harassed on account of the delay in disposal of the case.

12. In the cases on hand, as rightly held by the learned Court of Session, if there are sufficient reasons for not filing the documents earlier and the explanation for filing the documents at a later stage merits consideration, then the documents can be received on file subject to proof and admissibility and the request for recalling witnesses can

simultaneously be considered to enable the party to mark the documents and adduce necessary evidence related to the documents. In the facts and circumstances of the case, there are no circumstances to hold that the Court of Session has not judiciously exercised its discretion. On the other hand there are sufficient reasons to conclude that the learned Judge of the Court below is justified in granting the requests of the prosecution and that there is no impropriety, irregularity or illegality in the orders impugned.

13. On the above analysis and for the reasons aforesaid, this Court finds that there is no merit in these revisions and that the revisions can be dismissed with appropriate observations.

14. Resultantly, the revisions are dismissed confirming the orders impugned of the Court of Session subject, however, to the following observations: "Liberty is reserved to the accused to raise all the legally permissible objections for marking the document/CD, viz., CC Camera Footage, (electronic evidence). The Court of Session shall ensure satisfaction of all the legal requirements before permitting the said document to be marked, that is, before receiving the electronic evidence on record. The accused shall be given fair opportunity to cross examine the now recalled witnesses on all relevant aspects and also to recall any other

witness already examined in view of the permissions now granted to the prosecution.”

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

M.SEETHARAMA MURTI, J

17.08.2017
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