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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 24/2017 & Crl.M.A.139/2017 (stay)

KRISHNA CHAWLA Petitioner
Through Mr. K. Sunil with Ms. Praghya
Routray, Advs.

versus

STATE & ORS. Respondents
Through Dr. M.P. Singh, APP.
SI Om Prakash, P.S. Hauz Khas
Mr. M.K. Duggal, Adv. for R-2 & R-3

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ORDER

% **25.09.2017**

The petitioner/complainant has challenged the order dated 14.10.2016 passed by the learned Trial Court in connection with FIR No.983/2000 whereby the prayer made on behalf of the prosecution for recall of the DW2 and DW4 for cross-examination has been rejected.

It has been submitted on behalf of the petitioner that the DW2 and DW4 were cross-examined by the learned substitute APP as the APP, who was conducting the case, was on leave on that date. It has further been submitted that because of the substitute APP not being aware of the material facts of the case, the aforesaid two defence witnesses could not be cross-examined properly.

Learned counsel for the petitioner has submitted that power under

Section 311 CrPC is wide enough to permit a recall of the witnesses for the purposes of cross-examination and re-examination.

True it is that the power to recall witnesses for being cross-examined or re-examined is available with the Trial Court but the same is to be exercised with caution and circumspection. Section 311 of the CrPC reads as follows:

“311. Power to summon material witness, or examine person present. 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.”

Perforce, the aforesaid Section of the Code has to be read with Section 138 of Indian Evidence Act, 1872 which describes the order in which the examination of a witness is to be held.

“138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

The power under Section 311Cr.P.C. is to be exercised only for the

purposes of coming to a right decision by the Trial Court. Such power cannot be used in a whimsical manner and without sound and cogent reasons. The only paramount consideration for exercise of such power is the just decision of the case and that also only with respect to the deposition of only such persons who are sought to be recalled. Courts have been invested with such powers so that justice be done in each and every case.

It is not only necessary to come to a right decision in a criminal trial but equally important is the proposition that every accused should be given full opportunity to prove his innocence. Similar opportunity has to be provided to the prosecution as well, to prove its case. Neither of the parties have to be treated differently. It cannot be gainsaid that grant of fair opportunity to the accused as well as to the prosecution is necessary for a just disposal of the case.

In **P. Sanjeeva Rao v. State of A.P.**, AIR 2012 SC 2242, it has been held that a court must adopt a liberal view, specially, in the interest of justice for the purposes of allowing every opportunity to the parties to the trial to adduce relevant and necessary evidence. “Fairness of trial is a virtue which is sacrosanct in our judicial system and no price is too heavy to protect that virtue”. The Supreme Court in that case was of the view that any denial of opportunity to cross-examine a witness would cause serious prejudice to the case.

Coming to the facts of this case, it appears that DW2 was cross-examined by the In-charge/substitute APP in the absence of the APP, who was conducting the case and the DW4 was actually never cross-examined.

Learned counsel appearing for the respondent, however, has submitted that the aforesaid DWs have been examined and there is no

necessity of recalling them as it would tantamount to giving opportunity to the prosecution to plug the loopholes in the prosecution case. It has further been argued that the application under Section 311 of the CrPC, seeking recall of the aforesaid two defence witnesses was neither forwarded through the prosecution nor was signed by the complainant. He submits that these grounds have been taken into account by the Trial Court while rejecting such a prayer. Lastly, it has been argued that in a State case, the responsibility of conducting the prosecution case is of the State and there is nothing on record to show that the In-charge/substitute APP did not discharge his duties properly.

Be that as it may, since DW2 was cross-examined by the substitute APP, who was not in know of the facts in its entirety and DW4 was never cross-examined, this court is of the view that the demand of justice would be met if one opportunity is given to the complainant or the State to cross-examine the aforesaid defence witnesses, namely DW2 and DW4.

The Trial Court is directed to fix one date, on which both the witnesses for the defence shall be examined.

It is, however, made clear that no adjournment shall be granted by the Trial Court and on the date fixed, the defence witnesses ought to be produced for their cross-examination by the State/complainant.

With this direction, the present petition is allowed and disposed of.

ASHUTOSH KUMAR, J

SEPTEMBER 25, 2017

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