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

+ CRL.REV.P. 850/2017, CrI. M.A. 18584/2017

BHARAT KUMAR @ MONU & ORS

..... Petitioners

Through: Mr. R.P.S. Baghel and Ms. Hemlata,
Advs.

versus

STATE

..... Respondent

Through: Mr. Ravi Nayak, APP for State with
SI Kuldeep, P.S. Swaroop Nagar.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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14.11.2017

This petition has impugned order dated 13.09.2017 passed by the Additional Sessions Judge (North), Rohini Courts on the ground that recall of PW-7 is necessary. Apart from saying that the recall is necessary, no other arguments have been offered by the learned counsel for the petitioner. The impugned order reads as under:

*“IO has filed the FSL result. Copy supplied.
Ld defence counsel has filed an application u/s 311
Cr.P.C for recalling PW-7 Raju Raghav.*

*Copy supplied to Ld. Additional PP for State.
Ld Additional PP submits that he does not wish to
file reply to the application. However, he has
opposed the application on the ground that the
witness has already been cross examined by the*

defence counsel.

Heard. It is averred that at the time of cross examination of PW-7 some questions were left by the counsel for the accused. It is further stated that PW-7 was present at the spot at the time of incident and he had directed his sons and Monu for beating the accused Nand Lal with their shoes and slaps on the head.

I have perused the testimony of PW-7. PW-7 has testified that

it was revealed to him that accused persons had assaulted both his sons namely Sonu and Monu with knives and bats. Thus, from the testimony of PW-7, it is revealed that as per his deposition he was not present at the spot. The said witness in his cross examination has also been suggested that he had not witnessed the occurrence of the present case with his own eyes which has also been admitted by him, meaning thereby that even the accused have not disputed that PW-7 was not present at the spot. The averments made in the application suggest that the accused now want to change their stand by claiming that PW-7 was present at the spot. Even otherwise, sufficient opportunity has already been granted to the accused persons to cross examination the witness and witness has also been cross examined at length. The plea with regard to presence of PW-7 at the spot can be proved by the accused in their defence.

In view of the above discussion, I do not find any merit in the application. Hence, the application is dismissed.

Put up for P.E on 02.01.2018, 03.01.2018 and 05.01.2018. PW-2 Sonu Raghav cited at serial No. 1 be summoned for his further examination in chief alongwith PW cited at serial No. 2 in the list of witnesses for 02.01.2018. PWs cited at serial No. 8 & 7 be summoned for 03.01.2018 and PWs cited at

serial No. 8 & 9 be summoned for 05.01.2018. 10 be also summoned for the said dates.”

Apropos the recalling of a witness under Section 311 of the Criminal Procedure Code, the Supreme Court in **Mannan Sk vs. State of West Bengal (03.07.2014 - SC) : MANU/SC/0568/2014** held:

“The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.”

In **Mohanlal Shamji Soni vs. Union of India and another** (22.02.1991 - SC) : 1991 SCR (1) 712 the Supreme Court held:

“18. The next important question is whether Section 540 gives the court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

In **Rameshwar Dayal v. State of U.P.:** [1978]3SCR59 while expressing its views about the careful exercise of its power, the court held:

“It is true that under Section 540 of the Criminal Procedure Code (Section 311 of the New Code) the High Court has got very wide powers to examine any witness it likes for the just decision of the case, but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise The words, "Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play”.

Recall of the public witness in this case would be permissible only if it could be shown that the petitioner had been denied due opportunity to cross-examine the witness or that due to lack of opportunity his case got prejudiced. That, however, is not the case. The impugned order records that the only reason for seeking recall of the said witness, is that the defence counsel had left out some questions at the time of cross-examination. The impugned order nevertheless records that (i) sufficient opportunities were granted to the accused persons to cross-examination the witness and (ii) he had been so cross-examined and (iii) the issue of presence of PW-7 being present at the spot could be dealt with by the accused in their defence.

In the context of the aforesaid discussion and the circumstances of this case, the Court is of the view that the petitioner cannot be said to have been prejudiced. Therefore, his application has been rightly dismissed by the Trial Court.

In the circumstance, no ground is made out for recall of the said witness. No error is shown in the impugned order. The petition is without any merit. Accordingly, it is dismissed.

NAJMI WAZIRI, J

NOVEMBER 14, 2017/acm