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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.M.C.5231/2017**

NITIN SHARMAPetitioner
Through: Mr. Brijesh Sharma and Mr. Jaskaran Singh
Advocates.

versus

STATERespondent
Through: Mr. Amit Ahlawat, APP for State.

CORAM:
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

% **ORDER**
13.12.2017

Present petition has been filed by the petitioner under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.') for seeking setting aside of order dated 28.11.2017 passed by the Court of Metropolitan Magistrate, New Delhi in case FIR No.76/2007 under Section 279/304A of the Indian Penal Code, 1860 (hereinafter referred as 'IPC') registered at PS Mandir Marg, whereby the Trial Court dismissed an application moved by the petitioner under Section 311 Cr.P.C. for recall of PW-1 Ct. Jitender, PW-8 Dr. Rajiv and PW-10 SI Gurmail Singh, for cross examination.

Mr. Brijesh Sharma, learned Counsel for the petitioner submits that the vide order dated 25.09.2017 the prosecution evidence was closed and the

matter has been posted for recording of the statement of the accused/petitioner; that the prosecution witnesses have not been cross-examined by the counsel for the accused/petitioner as the petitioner was not accompanied by his counsel at the time of recording of prosecution evidence; that hence opportunity must be granted to the petitioner to recall PW-1 Ct. Jitender, PW-8 Dr. Rajiv and PW-10 SI Gurmail Singh, for cross examination and therefore in view of the above, the order dated 28.11.2017 passed by the Trial Court be set-aside.

The record reveals that,

- On **27.02.2013**, PW Jitender was partly examined and his further Examination-In-Chief was deferred for want of case property and at request of accused whose counsel was not available due to personal difficulty. Matter was listed for 15.05.2013.
- On **15.05.2013**, as Presiding Officer was on medical leave, matter fixed for 20.09.2013.
- On **20.09.2013**, no prosecution witnesses were present as the summons were not issued. Matter was listed for 21.01.2014.
- On **21.01.2014**, matter was again listed for 29.04.2014 as the summons remained unserved.
- On **29.04.2014** as Presiding Officer was on medical leave, matter fixed for 16.08.2014.
- On **16.08.2014** as Presiding Officer was on maternity leave, matter fixed for 20.12.2014.

- On **20.12.2014**, prosecution witnesses were returned unexamined as the accused who was present in person, failed to produce the case property. Matter was fixed for 08.05.2015.
- On **08.05.2015**, as Presiding Officer had gone to attend Environment Awareness & Stress Management Retreat, matter was fixed for **14.10.2015**.
- On **14.10.2015**, PW Jaikishan was examined as PW-2 and PW Kailash was examined as PW-3 and thereafter discharged. Matter was listed for 05.03.2016 for examination of other prosecution witnesses.
- On **05.03.2016**, PW Ct. Anuj Kumar was examined in chief as PW-4 and PW HC Rajinder Singh was examined as PW-5. Further the Trial Court ordered as under:

"perusal of the file reveals that PW-1 Ct. Jitender was partly examined in chief and his further examination was deferred for the want of case property. Thereafter the witness was not examined. Accordingly issue summons to PW-1 Ct. Jitender for the next date."

- On **16.07.2016** the Trial Court ordered as under:
"due to paucity of time, PW Jitender Kumar is returned unexamined. He is bound down for the next date."
- On **22.11.2016**, the Trial Court ordered as under:
*"vide order dated 27.02.2013, further examination in chief of PW1 Ct. Jitender was deferred
PW Ct. Jitender further examined in chief, cross*

examined by the accused and discharged."

- On **23.03.2017**, as PW ASI Devender Kumar remained absent despite service of summons, bailable warrants were issued against him and matter was listed for 27.06.2017.
- On **27.06.2017**, ASI Devender Kumar was examined as PW-7 and the matter was fixed for 22.08.2017.
- On **22.08.2017**, fresh summons were issued to PW Dr. Seema Rathi and Dr. Rajiv Sharma and matter was fixed for 25.09.2017.
- On **25.09.2017**, Dr. Rajiv Sharma-II was examined in chief as PW-8, Dr. Sanjay Kumar Solanki was examined in chief as PW-9 and SI Gurmel Singh was examined in chief as PW-10. PW8, PW-9 and PW-10 were cross examined by the accused and discharged. Thereafter prosecution evidence was closed and the matter was listed for examination of accused under Section 313 Cr.P.C.

From a perusal of the record, it transpires that on most of the dates when the matter was fixed for prosecution evidence, either the Presiding Officer remained absent or the prosecution witnesses did not turn up. The Order Sheets dated **22.11.2016** and **25.09.2017** do not reveal as to why PW1, PW-8 and PW10 were cross examined by the accused and not by his counsel. Further they are also silent on the aspect whether the accused was represented by a counsel or not or that whether the accused had been given an opportunity to call for his counsel or engage one for the cross examination of the prosecution witnesses

The power of the Court under Section 311 Cr.P.C. can be exercised both at the behest of accused(defence) as well as prosecution with the object of discovering relevant facts or obtaining proof of such facts for a **just decision of the case.**

In *Hazari Ram v. State of Rajasthan: 1994 CriLJ 3758* the Apex Court *inter-alia* observed as under:

"The accused has a right to cross-examine the witnesses to elicit the suppressed facts and to expose the discrepancies. The object of cross-examination is to impeach the credibility and the general value of the evidence given by the witnesses. The right to cross-examination is one of the valuable rights of the accused in order to elicit the truth from the witnesses. Though the accused has no right to seek postpone merit of the cross-examination and the cross-examination should follow the Examination-in-Chief, but in certain cases, where either the counsel for the accused is not available on account of some unforeseen reason event or the defence counsel is not prepared with cross-examining the witnesses when the Examination-in-Chief is over, then in such case, the trial Court, in its discretion, may permit the cross-examination of any such witness to be deferred until any witness is examined or recalled for cross-examination. The object of cross-examination is to enable the Court to arrive at the truth, irrespective of the fact whether the prosecution or the defence has examined the witnesses or failed to produce some evidence or due to unavoidable circumstances the accused failed to cross-examine the witnesses."

In view of the well settled principles of law and considering the consequences of lack of opportunity to cross-examine the witnesses as in the

present case, this Court would prefer to err in favour of giving an opportunity to the petitioner to recall the witnesses for cross- examination.

In these circumstances, in order to impart justice, and to arrive at a just and proper disposal of the case, this Court is of the opinion, that a reasonable opportunity must be afforded to the petitioner to cross-examine PW-1 Ct. Jitender, PW-8 Dr. Rajiv and PW-10 SI Gurmail Singh, through his counsel. Hence the impugned order dated 28.11.2017 is set aside.

Learned counsel for the petitioner undertakes to conclude the cross examination on the date fixed by the Trial Court without seeking any adjournments in the matter.

Order accordingly.

Petition stands disposed of

Copy of this order be given dasti under the signatures of the Court Master.

SANGITA DHINGRA SEHGAL, J.

DECEMBER 13, 2017