

IN THE HIGH COURT OF BOMBAY AT GOA  
**CRIMINAL WRIT PETITION NO. 155 OF 2018**

Lawrence Dias,  
S/o. Anthony Dias, age 30 years,  
Indian national, R/o. H.No.188,  
Mestabhat Mercedes,  
Tizwadi, Goa.

... Petitioner

Versus

The State of Goa  
Through Police Prosecutor,  
Panaji Goa

... Respondent

Shri Vithal Naik h/f. Shri V. Rodrigues, Advocate under Legal Aid Scheme for the petitioner.

Shri S.R. Rivankar, Public Prosecutor for the respondent.

**Coram:- NUTAN D. SARDESSAI, J.**

**Reserved on : 7<sup>th</sup> December, 2018**

**Pronounced on : 11<sup>th</sup> December, 2018**

**Judgment :**

1. Heard forthwith with the consent of the learned Advocates for the parties.
2. Rule.
3. Shri S.R. Rivankar, learned Public Prosecutor waives service of notice on behalf of the respondents.

4. This petition takes exception to the order dated 07/06/2018 passed by the Court of the Sessions Judge, North Goa Panaji pursuant to which the application of the petitioner for recall of the witnesses under Section 311 Cr.P.C. has been dismissed and by invoking the jurisdiction of this Court under Article 227 of the Constitution of India and Section 482 of Cr.P.C.

5. Heard Shri V. Naik, learned Advocate for the petitioner who submitted that the Advocate earlier representing the petitioner had not properly conducted the cross-examination due to which the defence of the petitioner was seriously prejudiced and there was a possibility of a failure and miscarriage of justice. The petitioner sought for the recall and re-examination of the witnesses to confront them with the documents in his possession namely the Discharge Card which would go to establish that he was nowhere in the vicinity of the scene of crime when the alleged incident took place. The petitioner would be seriously prejudiced in case this opportunity was denied to him. He placed reliance in **P. Sanjeeva Rao v/s. State of Andra Pradesh** [(2012)7 SCC 56] in support of his contention.

6. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State contended that there was no reason to allow the recall

of the prosecution witnesses considering even the case set out by the petitioner. The petitioner was bitten by a snake and was treated initially in the casualty which took sometime on the night of 11/11/2014 and was admitted in the hospital only on 12/11/2014 as per the Discharge Card now sought to be produced on record by way of confronting the witnesses earlier examined by the prosecution. There was no basis to allow the application for the recall of the prosecution witnesses who were medical professionals and subjected to gross humiliation and misbehavior at the instance of the petitioner who had taken law in his hand and assaulted one of the Doctors on duty. He placed reliance in **Rajaram Prasad Yadav v/s. State of Bihar and another** [(2013) 14 SCC 461] to buttress a plea that invoking the jurisdiction of the Court under Section 311 of Criminal Procedure Code was not a routine and empty formality and that it was only in instances where grave prejudice would be caused to the accused when such an application could be allowed while reiterating the principles culled out in **Rajaram Yadav** (supra), to substantiate his contention and pressed for the dismissal of the petition.

7. i have considered the submissions of Shri Naik, learned Advocate for the petitioner and Shri S.R. Rivankar, learned Public

Prosecutor, the judgments relied upon in **P. Sanjeeva Rao** and **Rajaram Yadav** (supra) and besides the provisions of Section 311 Criminal Procedure Code which deals with the plenary powers of the Court to summon a material witness or examine a person present if his evidence appears to the Court to be essential for the just decision on the case. Having considered all these aspects, i would now proceed to decide whether the petition as formulated is tenable or otherwise.

**8.** Section 311 Criminal Procedure Code reads thus :

“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.”

**9.** It has been the case of the petitioner that though he was bitten by a snake and had sought medical assistance in the GMC hospital, he was admitted on 12/11/2014 and in that context it was necessary to recall the witnesses examined by the prosecution to cross-examine them on that point considering the

fact that the earlier Advocate representing the interest of the petitioner under Legal Aid had not properly put forth the case in defence and which was seriously prejudicing the interest of the petitioner. In that context Shri Naik, learned Advocate read through the evidence of Dr. Karmali (Pw1) and more particularly her cross-examination to substantiate his contention apart from the testimony of Dr. Chaudhari (Pw2) and the cross examination recorded at the instance of the petitioner to put forth a case that their recall and further cross-examination was absolutely essential for rendering a fair trial to the petitioner and to meet the ends of justice.

**10.** i have examined the evidence of both these prosecution witnesses and otherwise examined the Discharge Card which is proposed to be produced on record to confront these witnesses at the instance of the petitioner. A bare reading of the Discharge Card reveals that the petitioner had reported at the GMC Hospital complaining of snake bite by a Cobra at about 6.30 to 7.00 p.m. on the evening of **11/11/2014** and at that time he was subjected to various examinations and placed under admission in the hospital only on **12/11/2014** and discharged on 13/11/2014. There appears force in the contention of Shri Rivankar, learned Public Prosecutor that the initial clinical examination of the

petitioner upon reporting at the GMC Hospital took considerable time and only thereafter around midnight i.e. on the following day i.e. 12/11/2014 was he admitted in the hospital and kept under observation. Therefore this Discharge Card cannot at all buttress the case of the petitioner when even in his application for the recall of the witnesses it was disclosed that after being bitten by a snake on 11/11/2014, he had gone for treatment in GMC but was not given any treatment during the late evening time and was actually treated and administered antivenom only on 12/11/2014. In other words this Discharge Card on his own showing does not at all substantiate his plea that he was not available in the hospital during the late evening hours of 11/11/2014 when the alleged incident of obstructing the Doctors on duty and even abusing them took place.

**11.** In **P. Sanjeeva Rao** (supra), a two Judge Bench of the Hon'ble Apex Court emphasized the object underlying Section 311 Cr.P.C. being to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial and discovery of the truth is the essential purpose of any enquiry or trial.

**12.** The two Doctors who are sought to be recalled for further cross-examination were examined on 26/10/2017 and 31/10/2017 while the application for recall of the witnesses came much later on 09/03/2018. It is not as if the Discharge Card was not in the control of the petitioner to give proper instructions to the Counsel appointed on his behalf under Legal Aid in the first instance. It was also not his case that he had access to this Discharge Card only when the next Counsel was appointed to represent his case under Legal Aid. The factum of his entry to the hospital and formal admission in the hospital were facts well within his knowledge right from the inception and therefore it is rather preposterous to assume that the petitioner had access to this record much later and as to cross-examine the witnesses on that point. Last but not the least, it also casts aspersion on the Legal Aid Counsel appointed by the Court to represent the interest of the petitioner without any basis and as to project that his case was not properly put forth in defence while cross-examining the prosecution witnesses.

**13.** In **Rajaram Yadav** (supra) another two Judge Bench of the Hon'ble Apex Court culled out the following principles to be borne out in the mind of the Court while dealing with the application under Section 311 namely:

- 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?
- ii) 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.
- iii) 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.
- iv) 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.
- v) 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.
- vi) The wide discretionary power should be exercised judiciously and not arbitrarily.
- vii) 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.

viii) 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.

ix) 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.

x) 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.

xi) 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.

xii) The additional evidence must not be received as

a disguise or to change the nature of the case against any of the party.

xiii) 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.

xiv) 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.

**14.** Considering the requirements of Section 311 Cr.P.C, the judgments in **P. Sanjeeva Rao** and more particularly that in **Rajaram Yadav** (supra), there is no basis to quash the order under challenge. Besides the learned Sessions Judge had duly considered the judgements relied upon on behalf of the petitioner and the respondent- State and in the factual matrix felt it appropriate that the recall of the witnesses could not be routinely permitted on the ground that the cross-examination was not proper and that the same could not be allowed on the mere

asking. This order of the learned Sessions Judge does not justify any interference in this petition invoking the jurisdiction of this Court under Article 227 of the Constitution of India and Section 482 Cr.P.C.

**15.** In view thereof, i pass the following

**O R D E R**

Rule is discharged.

Writ Petition is dismissed with no order as to costs.

**NUTAN D. SARDESSAI, J.**

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