

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.5150 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. challenging the order dated 28.02.2018 passed by the I Additional Sessions Judge, Nalgonda in Crl.M.P.No.813 of 2018 in S.C.No.394 of 2015 dismissing the petition filed under Section 311 Cr.P.C. to recall PWs. 1 to 6 for further cross examination by the new counsel appointed by the counsel for the petitioner, raising specific grounds.

It is the case of the petitioner that due to financial difficulties, when the petitioner could not engage counsel of his choice, Sri A.Venkat Reddy, State brief Legal Aid counsel was appointed. When the matter is coming up for further evidence, the family members of the petitioner found that the witnesses were not properly cross examined by the State brief counsel and therefore, the petitioner engaged Sri M.Rama Chandra Rao, Advocate to prosecute the proceedings in the Sessions Case. On verification of record, new counsel found that certain crucial aspects have not been elicited in the cross examination of PWs.1 to 6 and requested to permit the petitioners to recall PWs.1 to 6.

Additional Public Prosecutor filed counter denying the material allegations while contending that the sessions case was double murder case and two persons were brutally murdered, caused grievous injuries to other two persons and that the evidence of prosecution is almost completed and PWs.1 to 6 were examined by the State brief counsel appointed by the Court to defend the accused in the sessions case. Merely because, the counsel was changed, witnesses cannot be recalled since ample opportunity was given to the petitioner's counsel to cross examine the witnesses at length and prayed for dismissal of the petition.

The trial Court after hearing both counsel and considering the material available on record dismissed the petition recording its own reasons.

The order is now assailed in the petition on the ground that the reasonable opportunity has to be afforded to the petitioner to have fair trial, otherwise much prejudice would be caused to him. The order passed by the Court below is erroneous and prayed to quash the order passed by the Sessions Judg.

From the facts of the case, it is evident that A.Venkat Reddy, Advocate was appointed as State Brief counsel to defend the case of the petitioner as the petitioner got financial difficulty and inturn his family members advised him to file application under Section 311 Cr.P.C. and accordingly he filed the said petition. The reason for recalling witness is change of advocate and the advice given by the counsel engaged recently. The Apex Court in **AG vs. Shiv Kumar Yadav and others**¹ laid down certain guidelines at paragraph 29, they are extracted hereunder:

- i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

¹ AIR 2015 sc 3501

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

In guideline No.(ix) it was held that the Court can permit recalling of witness since the denial of it would amount to denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings. At the same time, guideline No. vii made it clear that change of counsel cannot be ground to recall the witness. The Courts cannot permit the parties to recall the witness whenever they like and that part in ***Rajaram Prasad Yadav v State of Bihar***² the Apex Court pointed out certain circumstances where the Court can exercise power under Section 311 Cr.P.C. which are as follows:

- 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 and 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

² AIR SC 2013 3081

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 safeguard, 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.”

In view of the law declared by the Apex Court in the above judgments referred supra, it is difficult to accept the contention of the learned counsel for the petitioner. However, learned counsel for the petitioner would draw the attention of this Court to the judgment of the Apex Court in **Hanuman Ram v State of Rajasthan and others**³ whereby while considering the facts and circumstances of the case held that the object underlying under Section 311 is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The Section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311

³ AIR 2009 SC 69

the significant expression that occurs is 'at any stage of inquiry or trial or other proceedings under this Code.' It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

Even if this principle is followed and applied to the present facts of the case, the petition is totally silent on what aspect the witnesses have to be cross examined. Further except making a bald statement that the State brief counsel changed as he has not elicited certain facts is not a ground to exercise power under Section 311 Cr.P.C. to permit the petitioner to cross examine witnesses. If such practice is allowed and encouraged, it is difficult for the Sessions Judge to complete trial, since the parties may change their counsel and file petitions one after the other to protract the proceedings for one reason or the other.

The reasons recorded by the Sessions Judge are squarely covered by the judgment of the Apex Court in **A.G. v. Shiv Kumar Yadav** referred supra and rightly dismissed the petition. Therefore, the order passed by the Sessions Judge is legally valid and warranting no interference by this Court and the criminal petition is liable to be dismissed.

Accordingly, the criminal petition is dismissed.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

18.06.2018
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