

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos. 5995, 6009, 6014, 6037, 6039 AND 6046 OF 2018

COMMON ORDER:

Criminal Petition Nos. 5995, 6009, 6014, 6037, 6039 and 6046 of 2018 are filed under Section 482 of the Code of Criminal Procedure (for short, "Cr.P.C.") by the petitioner-accused to quash the order dated 24-05-2018 in Criminal M.P.Nos. 44, 39, 40, 42, 41 and 43 of 2018 on the file of the Court of II Additional District & Sessions Judge, Hindupur (for short, 'the Court below'), whereby the Court below dismissed the above miscellaneous petitions filed under Section 311 of Cr.P.C. to recall P.Ws.1, 2, 10, 4, 14 and 3 respectively.

2. The main grievance of the petitioner is that he engaged one senior counsel from Hindupur Bar Association to conduct defence on his behalf but the petitioner could not elicit certain facts from the prosecution witnesses by oversight and thereby he lost confidence against his own counsel; that later, he engaged Sri Subhash Chandra Bose, who worked as Junior Civil Judge, as his counsel but he lost confidence against his second counsel too; that now he himself conducting the case on his behalf and consequently there are certain omissions and contradictions in the evidence and sought the relief to recall the witnesses referred *supra* for further cross-examination. The Court below dismissed all the miscellaneous petitions assigning its own reasons, more particularly on the ground that despite affording reasonable opportunity to cross-examine the witnesses effectively, he elicited certain facts which amount to admission of the prosecution case and that a witness cannot be recalled to fill up *lacunae*.

3. Aggrieved by the orders passed by the Court below, the present petitions are filed on the sole ground that unless the witnesses are recalled and cross-examined, the true facts cannot be elicited and dismissal of the petitions by the Court below amounts to denial of fair opportunity to the petitioner to prosecute his case.

4. At the hearing, while learned counsel for the petitioner has reiterated the grounds urged in the petitions, learned Public Prosecutor (A.P.) has opposed the petitions on the ground that the petitioner changed his counsel two times and now conducting his own case personally at the stage of arguments and that a witness cannot be recalled to fill up the *lacunae*.

5. In view of rival contentions, the point that arises for consideration in all the petitions is

"Whether the witnesses P.Ws.1 to 4, 10 and 14 are to be recalled in view of certain facts elicited in the cross-examination of the witnesses which affect the case of the defence by exercising power under Section 311 of Cr.P.C.?"

6. **POINT:**

The jurisdiction of this Court under Section 482 of Cr.P.C. is limited and such power can be exercised sparingly in exceptional circumstances. In the present case, the main dispute is with regard to eliciting certain facts which affect the defence case drastically. It is an undisputed fact that the petitioner lost confidence against his first counsel who is a senior counsel from Hindupur Bar Association; that later, he engaged another counsel by name Subhash Chandra Bose, on whom also he lost confidence and that now he himself prosecuting the proceedings. The reason assigned in all the petitions is that certain facts were

elicited which are in the nature of admission of prosecution case by the petitioner himself. A bare look at the allegations made in the petitions filed under Section 311 of Cr.P.C. before the Court below, the petitioner changed his counsel two times who elicited certain facts which are in the nature of admission by the petitioner.

7. Section 311 of Cr.P.C. permits the Court to re-examine any witness, who were already examined, by exercising its power to do complete justice to the parties before it. Section 311 of Cr.P.C. consists of two parts, first part relates to issuance of summons to any person as a witness or re-summon who is already examined; and second part did not confer any discretionary power on the Court since the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to arrive at a just decision of the case. Hence, the first part confers discretion on the Court. As per Section 311 of Cr.P.C., a general power is conferred on the Court to arrive at a just conclusion, irrespective of whether either of the parties have chosen to summon him or not, but such power should be exercised sparingly. In the case on hand, the witnesses were already examined and it is at the stage of arguments, the petitioner lost confidence on his two counsel as they elicited certain facts which are in the nature of admission of prosecution case by the petitioner himself which drastically affect the case of the defence set up by the petitioner before the Court below. When the petitioner engaged two counsel and cross-examined the witnesses effectively, it would not give raise to exercise power under Section 311 of Cr.P.C. to recall the witnesses. Therefore, negligence attributed to the counsel in cross-examining the witnesses is not a ground to exercise power under Section 311 of Cr.P.C.

8. In **A.G. Vs. Shiv Kumar Yadav**¹, the Apex Court laid down certain guidelines to exercise power under Section 311 of Cr.P.C. and 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;
- 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.

Even according to guideline No. (vii), mere change of counsel cannot be a ground to recall the witnesses.

9. The apprehension of the petitioner before this Court is that if the witnesses are not recalled and re-examined, it will seriously affect the case of the petitioner. However, the power under Section 311 of Cr.P.C. cannot be

¹ AIR 2015 (SC) 3501

exercised on mere asking by filing an application to fill up *lacunae* in the evidence. Having elicited certain facts which go to the root of the case of the defence and seriously affect, such *lacunae* cannot be filled up by recalling the witnesses exercising power under Section 311 of Cr.P.C. and the Court must also keep in mind not only the prejudice of the petitioner-accused but also the prejudice that would be caused to the prosecution, more particularly in a case of this nature. The contents of the petitions disclose that the petitioner wanted to fill up the *lacunae* in the evidence by putting certain suggestions and eliciting certain facts denying the facts elicited earlier by the counsel on record but such practice cannot be permitted by Courts. Hence, I find the ground urged in the petitions that change of counsel two times and conducting prosecution by the petitioner himself and to fill up the *lacunae* in the evidence is no more good ground to exercise power under Section 311 of Cr.P.C. and hence, the petitions are liable to be dismissed.

10. The criminal petitions are accordingly dismissed. Pending miscellaneous petitions, if any, in these criminal petitions shall stand dismissed in consequence.

Date: 15-06-2018.

JSK

M.SATYANARAYANA MURTHY, J.