

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.7032 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. challenging the order dated 22.06.2018 passed by the III Additional Chief Metropolitan Magistrate, Hyderabad in Crl.M.P.No.2519 of 2018 in C.C.No.308 of 2015 dismissing the petition filed under Section 311 Cr.P.C. to recall PW. 6.

The petitioner filed petition under Section 311 Cr.P.C. alleging that on 11.05.2018, PW.6, the Investigating Officer of the crime was examined in chief in part before the Court below and for marking the material objects further examination in chief was adjourned and the material objects were marked on 17.05.2018. During cross examination, certain contradictions were elicited in the testimony of the very same witness that he seized the material objects used in the commission of offence. Though several questions were put to PW.6, due to over sight, the important aspect about seizure panchanama and signatures of mediators and investigating officer on the report was not confronted to PW.6 to prove the defence set up by the petitioner. Thus, PW.6 is to be recalled for limited purpose of confronting the signatures of the mediators and the investigating officer on the panchanama and requested to pass appropriate order by exercising power under Section 311 Cr.P.C.

The prosecution filed counter before the trial Court denying material allegations *inter alia* contending that the investigating officer was examined on the previous date of adjournment while, the investigating officer was called to mark MO.1, the seizure of panchanama including confession leading to discovery and that the witness was cross examined at length by the defence counsel as the Court afforded reasonable opportunity to the defence counsel to cross examine PW.6. Therefore, there is no need

to cross examine PW.6 further to confront the signatures of mediators and investigating officer on the panchanama.

The trial Court after hearing both counsel dismissed the petition on the ground that the petitioner was filed petition to fill up gaps or lacunas in the cross examination when the case was posted for examination of the accused under Section 313 Cr.P.C. and at the fag end of the trial, the witness cannot be recalled and dismissed the petition.

Aggrieved by the said order, the present petition is filed under Section 482 Cr.P.C. questioning the order on the ground that the reasons recorded by the trial Court are erroneous and at any stage, the petition under Section 311 Cr.P.C. can be filed and that it is not intend to fill up the lacunas. In fact, it was not the contention of the prosecution before the trial Court in the counter and prayed to quash the order passed by the trial Court.

It is an undisputed fact that the trial in C.C.No.308 of 2015 was completed except examination of accused under Section 313 Cr.P.C. The Investigating Officer was examined as last witness i.e. PW.6. During his evidence, MO1 was marked and the basis for marking of MO1 is confessional statement leading to discovery, which is admissible under Section 27 of the Indian Evidence Act. But the contention of learned counsel for the petitioner before the trial Court is that he was not confronted the signature of the mediators and his signature on the confessional statement leading to discovery and for limited purpose sought for recall of PW.6. But the Court below did not accept this contention only on the ground that it was belated and such application was filed at the fag end of trial when the calendar case was posted for examination of accused under Section 313 Cr.P.C. The reason assigned by the Court below is contrary to the purport of Section 311 Cr.P.C. Section 311 Cr.P.C. permits the Court at

any stage of any inquiry, trial or other proceedings under the 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. Section 311 consists of two parts. As per first limb, the power is vested on the Court to 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. The present case would fall within the first limb of Section 311 Cr.P.C. The intention of legislature in incorporating Section 311 Cr.P.C. is to afford fair and reasonable opportunity to examine accused to prove the defence set up by him. 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;
- (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;

¹ AIR 2015 sc 3501

(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.

Similarly 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 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.

² AIR SC 2013 3081

- 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."

If the above principles are applied to the present facts of the case to have fair trial and afford reasonable opportunity to the defence, recall of witness is necessary only for limited purpose of confronting the signatures of mediators and investigating officer on the confessional statement leading to discovery. If for any reason, such relief is declined much prejudice would be caused to the petitioner and to avoid such prejudice and to do fair and substantial justice to the party, the trial Court ought to have exercised

power under first limb of Section 311 Cr.P.C., but committed error in dismissing the petition as the application was filed at belated stage when the calendar case was posted for examination of the accused under Section 313 Cr.P.C., which is contrary to the purport of Section 311 Cr.P.C. Therefore, I find that it is a fit case to allow the criminal petition to afford an opportunity to the petitioner only for the limited purpose of confronting the signatures of mediators and investigating officer on the confessional statement leading to discovery admissible under Section 27 of the Indian Evidence Act.

In the result, the criminal petition is allowed setting aside the order dated 22.06.2018 in CrI.M.P.No.2519 of 2018 in C.C.No.308 of 2015 passed by the III Additional Chief Metropolitan Magistrate, Hyderabad and that the III Additional Chief Metropolitan Magistrate, Hyderabad is directed to recall PW.6 and permit the defence counsel to cross examine PW.6 only to confront the signatures of mediators and investigating officer on the confessional statement leading to discovery and not to permit further cross examination beyond the above direction.

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

23.07.2018
kvrm

M.SATYANARAYANA MURTHY,J