

HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

Criminal Petition No.11292 of 2018

ORDER:

The petitioner-accused in S.C.No.62 of 2015 on the file of the learned Sessions Judge, Mahila Court, Vijayawada, filed Crl.M.P.No.789 of 2018 for recall of PW4-*de facto* complainant for further examination invoking Section 311 Cr.P.C. and said M.P. was ended in dismissal on 14.09.2018 by the learned Sessions Judge and impugning the same, the present Criminal Petition is filed.

2. Section 311 Cr.P.C. runs in two parts. For more clarity it reads that any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned a witness, or recall and re-examine any person already examined. It is clear of judicial discretion of the Court from use of the word 'may' to exercise depending upon the facts and circumstances and thereby not for sake of mere asking without showing any just reasons so far as the second part is concerned, it reads that the Court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. This part imposes duty on the Court to recall or reexamine or examine any witness provided there shall be a foundation on facts of same is essential for just decision of the case and otherwise the second part of the section has no application but for the first part of the section supra.

3. The Apex Court in **Zahira Habibulla H Sheikh v. State of Gujarat [2006 Crl. Law Journal 1694]** observed categorically therefrom on the power under Section 311 Cr.P.C. is purely discretionary from the two parts and not as of right for any person to ask for recall and it all depends upon the facts to recall or not in exercise of the discretion so far as the first part is concerned; and so far as the second part is concerned, for a just decision of the case if it shall be essential.

4. Here, any such case made out for second part of essential for just decision of the case for recall of PW4 already examined is concerned, the power available for the Court is not only confined by Section 311 second part Cr.P.C. supra, but also under Section 165 of the Evidence Act, 1872. Section 165 of the Evidence Act, 1872 clearly speaks that Court may at any stage put any questions to any witness in any form even irrelevant though ultimately to consider what is the relevancy with reference to admissibility with reference to the Evidence Act, 1872 (Section 136).

5. Here the petitioner-accused wants to put six questions to PW4 in seeking by recall. He has to make a foundation for not as a matter of Courts to ask for the recall from the above and no such factual foundation shown but for to consider if at all any necessity for just decision of the case.

6. The first question reads that in the complaint PW4 said that his grandmother (deceased) was having four gold bangles, but in his chief examination he did not speak about that, more to that on 30.11.2011 he stated his mother was spoken with the deceased, but he did not mention the time. If he mentioned in the report and did not state in his evidence, there is no necessity for the accused to poke his nose by putting a question; thereby, it no way relevant to the just decision of the case. So far as the second question is concerned, PW4 is not the purchaser of those gold ornaments said to have committed theft by the accused and there is no possibility for him to speak about the exact weight of those ornaments. In his chief examination, he stated that he has seen and found the Nanutadu, ear studs of the deceased grandmother and also the cell phone that were missing and the total weight of said ornaments is around 4 kaus. What he stated is from conclusion of he has seen and found the ornaments, therefrom he stated in approximate. No clarification is required for anybody on seeing can approximately say. Thereby, the second question is also not necessary to put by the recall for just decision of the case. Coming to the third question, it is alleged that he is the person who destroyed total evidence in the case and he himself broke the door of the deceased house and entered into the premises prior to the calling of the police, and he himself admitted that he called LW7 in this case and on his advice he broke the door. He admittedly deposed that through LW7 he cause broke the door. The chief examination in this

regard reads that in the evening (on 01.12.2011 for his grandmother did not attend the marriage function of the relatives) his mother called her over phone and informed to visit the house of his grandmother, then himself and his friends LWs 9 & 10 went at about 8.15 P.M. and enquired the neighbouring persons, then the opposite persons inside the premises stated that they did not see her after 30.11.2011 at 6.00 P.M. He saw that inside the light was switched on and the door was locked from outside. Then he called his paternal uncle/LW7 Head Constable and informed him that light is switched on and the door was locked from outside. Then LW7 suggested him to break open the doors. He called his mother and informed the same. Then he went to one Sambasivarao who is residing in ground floor and has taken one iron rod from him, then the neighbouring persons and his friends accompanied him and all of them broke open the doors and seen their grandmother is lying on her abdomen and she was found dead in pool of blood. There is no ambiguity in the said deposition of him. The putting of the question of he destroyed total evidence by broke open the door of the house and entered the premises prior to calling of police does not arise as what he admitted and stated in evidence supra is very clear. Thereby, putting of any further such question by recall in this regard beyond what was cross-examined does not arise with any necessity for a just decision. Even coming to the question No.4, in the complaint lodged by PW4 he stated that on 01.12.2011 his grandmother did not come to the function of their relatives. What he

stated in the chief examination of he came to know that his grandmother was not come to the marriage function. His evidence is very clear that he came to know of on 01.12.2011 his grandmother did not attend the marriage function when he called the relatives and came to know of she did not visit their house. Once the evidence is he came to know even in the report it is stated of personal knowledge, that is not a material contradiction to belie his evidence much less to say there from to permit for just decision of the case any answer to elicit by putting that question. Coming to the question No.5, PW4 stated he has seen the lighting inside the house of the deceased and the photos of the structure of the deceased house was not marked. If at all it is not marked and not photographed, it is the Investigating Officer to put to such a question and not PW4 for PW4 is not the Investigating Officer. Thereby, putting such a question to PW4 has formulated in question No.5 does not arise much less for just decision of the case. Coming to the question No.6, PW4 did not mention regarding the presence of any weapon or instrument with which the deceased person was killed. Once he did not speak the accused need not poke his nose by putting a question and elicit in the cross-examination what he silent from the prosecution, thereby that is also answerable for just decision of the case.

7. Having regard to the above, when none of the questions are within the scope of Section 311 Cr.P.C. and Section 165 of the

Evidence Act, there is nothing to interfere by sitting against the order of the lower Court dismissing the petition in not permitting those six questions formulated to put to PW4 by recall.

Accordingly, this Criminal Petition is dismissed. It will not prejudice any of his available defence during the arguments from the evidence available on record.

Consequently, miscellaneous petitions, if any shall stand closed.

29.10.2018

Note : Issue C.C. by 31.10.2018
(B/O)
MVA

Dr. B.SIVA SANKARA RAO, J

