

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.11634 of 2018

ORDER:

The petitioner is the sole accused in C.C.No.1192 of 2015 pending on the file of learned XVII Additional Chief Metropolitan Magistrate, Hyderabad. While evidence of PW.8 was in progress, a petition to recall PWs.1 to 6 invoking Section 311 Cr.P.C. by the petitioner/accused was filed in Crl.M.P.No.2659 of 2018. The petition was partly allowed after hearing both sides with an observation particularly at Para 8 that PWs.1 to 3 were examined in chief on 12.04.2018 and at request of accused posted to 07.06.2018 and even on that day learned counsel for the accused was not present even passed over up to 03.30 PM and it is therefrom their cross examination was treated nil. Subsequently on 05.07.2018 (from the no objection of previous counsel, another counsel for the accused was engaged to defend). PWs.4 to 6 were examined in chief and learned counsel was not present and their cross examination treated nil. It is on 02.08.2018 by the new counsel filed the petition after PW.7 was examined and PW.8 evidence in progress. The Court permitted recall of PWs.1, 2 & 4 to 6 saying they are private witnesses and not PW.3 being a Government employee who cannot be vexed by repeated calling to attend the Court by obtaining leave without cross examination.

Section 311 Cr.P.C. needless to say runs in two parts and so far as second part concerned, it is mandatory from the use of the word 'shall' where for the effective disposal and to arrive at a just decision such evidence is necessary Court duty bound. So far as Section 311 first part concerned, the use of the discretion may judiciously subject to facts and foundation.

The factual foundation in this case is earlier counsel not cross examined PWs.1 to 6 and there was change of advocate therefrom that new advocate cross examined PW.7 & PW.8 in part.

Once such is the case, instead of evidence to be allowed of PW.3 untested for cross examination, practically incomplete that to be recalled as necessary to permit cross examination among PWs.1 to 6 other than PW.3, once permitted by lower Court, merely because PW.3 is a Government employee, it is not a ground for refusal of his recall, but for to allow the petition by his recall for cross examination.

Having regard to the above and in the result, this Criminal Petition is allowed by permitting the recall of PW.3 to be summoned, if not cross examined, for cross examination on the date fixed and the accused has to deposit Rs.3,000/- to meet the TA and DA of the witness and if anything remained to pay the same to the Army Welfare Fund by the trial Court. If failed to deposit said amount within one week

from the date of receipt this order before the Superintendent or Bench Clerk of the lower Court, the order of the lower Court holds good for all purposes without any further reference to this Court.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 20.11.2018
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