

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on : 30th May, 2018

Judgment delivered on: 02nd July, 2018

+ CRL.REV. P. 285/2018

GAGANDEEP SINGH @ GAGGI

..... Petitioner

versus

**THE STATE GOVT. OF NCT
OF DELHI**

....

Respondent

Advocates who appeared in this case:

For the Petitioners	:	Mr Kuldip Babbar
For the Respondents	:	Mr Mukesh Kumar, APP SI Virender Kumar

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

CRL.REV. P. 285/2018 & CrI.M.A.5999/2018(interim relief)

1. Petitioner/accused impugns order dated 05.03.2018, whereby, on an application under Section 311 of the Code of Criminal Procedure (Cr.P.C.) filed by the petitioner, the Trial Court has declined to summon Saurabh Goyal , son of Shri Bijender Goyal, as a Court witness, though has permitted the petitioner to summon the said witness as a defence witness.

2. Petitioner is an accused in FIR No.347/2017, Police Station K.N.Katju Marg, Rohini, initially registered under Section 307/34 IPC

read with Section 27 of Arms Act. Subsequently, Section 302 IPC has been added as the victim therein passed away allegedly because of the injuries sustained.

3. Saurabh Goyal, the witness who is sought to be summoned by the petitioner as a Court witness, is the brother of the deceased. Saurabh Goyal was initially cited as a prosecution witness but has been subsequently dropped by the prosecution from the array of witnesses. The petitioner had sought to summon the said Saurabh Goyal, brother of the deceased, as a court witness to confront him with an alleged recorded conversation between the mother of the petitioner and Saurabh Goyal, which was recorded on the mobile phone of the sister of the petitioner. The recording is stated to have been made when Saurabh Goyal is alleged to have gone to the house of the petitioner.

4. It is alleged by the petitioner that on the night of 27.12.2018, Saurabh Goyal along with his father Mr Bijender Goyal and Mausí's son (name not known) barged into the house of the accused/petitioner at around 11.00 PM. Ms Harmeet Kaur, the mother of the petitioner was having a telephonic conversation with Ms Avneet Kaur, W/o. Vipin Rajpoot, who is the real sister of the accused/petitioner. When Saurabh Goyal barged into the house of the accused/petitioner, the petitioner's mother kept down the phone but the call was not disconnected. As a result, the sister of the accused/petitioner could hear the conversation between the mother of the petitioner and Mr

Saurabh Goyal, his father Mr Bijender Goyal and Saurabh Goyal's Mausi's son. The sister of the petitioner put her mobile phone on recording mode and thus the entire conversation between the mother of the petitioner and Saurabh Goyal was recorded on the mobile phone No. 9999517550 belonging to Ms. Avneet Kaur which remained connected to the Mobile No. 9911992754 and which was being used by Ms Harmeet Kaur to talk to Ms Avneet Kaur. Consequently, the talks between Saurabh Goyal, Ms Harmeet Kaur, Mr Bijender Goyal and the Mausi's son of Mr Saurabh Goyal running into 19 minutes and 29 seconds were recorded on the mobile phone of Ms Avneet Kaur.

5. It is stated that the original mobile phone containing the recorded telephonic conversation was produced in the Trial Court and was seized by the Trial Court.

6. It is alleged that Saurabh Goyal with his father and Mausi's son intimidated the family members of the petitioner and threatened them with dire consequences if he failed to depose against co-accused Vipin Rajpoot in Court during trial proceedings. It is alleged that Saurabh Goyal was drunk at that time. It is alleged that the conversation shows that PW Vinod Kumar (PW – 28) and PW – 6 (the complainant) both are the planted witnesses of the prosecution. Saurabh Goyal is alleged to have bragged about his financial powers and his capacity to influence the Police and threatened that if the petitioner failed to depose against the co-accused Vipin Rajpoot, he

would be got eliminated by the brothers of the deceased Nikunj Goyal. It is stated that all other public witnesses, except PW – 28 and PW – 6, did not support the version of the prosecution as they were not planted witnesses.

7. It is submitted that Saurabh Goyal is the only prosecution witness who has been dropped. It is alleged that he has been dropped as the prosecution got an inkling of the strategy of the defence to confront Saurabh Goyal with his recorded conversation.

8. It is further submitted that an application under Section 311 Cr.P.C. was filed on 24.02.2018 for summoning Saurabh Goyal as a court witness, however by order dated 26.02.2018 the trial court directed that the application under Section 311 Cr.P.C. was not pressed at that stage. Subsequently, it is alleged that on 02.03.2018 at around 07.45 P.M., said Saurabh Goyal once again barged into the house of the petitioner and threatened his mother not to press the application under Section 311 Cr.P.C. and warned her of dire consequences. A police complaint was made to the D.C.P. (Rohini) on 03.03.2018. Therefore, on 05.03.2018, subject application was filed under section 311 Cr.P.C., which has been disposed of by the trial court by the impugned order holding *“According to the learned counsel, examination of this witness is very much necessary for the just decision and to arrive at a conclusion that the witness has been planted if that is the position then the defence can very well summon him as their own witness instead of using the Court for summoning*

their witnesses as a Court witness.”

9. It is submitted by learned counsel for the petitioner, that petitioner cannot summon the real brother of the deceased, who has falsely implicated the petitioner as a defence witness as he would depose against the defence and sabotage the defence of the petitioner. It is submitted that the purpose of summoning him as a court witness is to confront him with the recorded conversation of his threatening the mother of the petitioner and admitting that he has falsely implicated the petitioner.

10. Learned APP appearing for the State submitted that the said witness was not produced as he was sought to be produced for the purposes of identification, which identification has been got proved through another witness and as such there was no need to produce him as a witness. Further, it is submitted that the purpose of the petitioner is to mislead the court.

11. Section 311 Cr.P.C. reads as under:

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this 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.”

12. The Supreme Court of India in *Mohanlal Shamji Soni v. Union of India*, 1991 Supp (1) SCC 271 has held as under:

“6. Before adverting to the arguments advanced on behalf of the appellant, we would examine in general the scope and intent of Section 540 of the old Code (corresponding to Section 311 of the new Code).

7. Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading ‘Miscellaneous’. But the present corresponding Section 311 of the new Code is found among other sections in Chapter XXIV under the heading ‘General Provisions as to Enquiries and Trials’. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words ‘to be’ before the word ‘essential’ occurring in the old section. This section is manifestly in two parts. Whereas the word used in the first part is ‘may’ the word used in the second part is ‘shall’. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it ‘at any stage of enquiry, trial or other proceedings’ under the Code to act in one of the three ways, namely,

- (1) to summon any person as a witness, or*
- (2) to examine any person in attendance, though not summoned as a witness, or*
- (3) to recall and re-examine any person already examined.*

8. The second part which is mandatory imposes an obligation on the court —

- (1) to summon and examine, or*

(2) *to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.*

9. *The very usage of the words such as ‘any court’, ‘at any stage’, or ‘of any enquiry, trial or other proceedings’, ‘any person’ and ‘any such person’ clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.*

10. *It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under Illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal*

duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge its statutory functions — whether discretionary or obligatory — according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain

proper proof of relevant facts in order to meet the requirements of justice. In this connection we would like to quote with approval the following views of Lumpkin, J. in *Epps v. S.* [19 Ga 118 (Am)] , which reads thus:

“... it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly Counsel seek only for their client's success; but the judge must watch that justice triumphs.”

17. The law is clearly expounded in the case of *Jamatraj Kewalji Govani* [(1967) 3 SCR 415 : AIR 1968 SC 178 : 1968 Cri LJ 231] (referred to above) wherein *Hidayatullah, J.* as he then was, while speaking for the bench about the unfettered discretionary power of the court as envisaged under Section 540 of the Code has stated thus: (SCR pp. 422-23)

“It is difficult to limit the power under our Code to cases which involve something arising ex-improviso which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides

... It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the

trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

18. The next important question is whether Section 540 gives the court carte blanche drawing no underlying principle in the exercise of the extraordinary power and whether the said section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court

while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

19. Fazal Ali, J. in *Rameshwar Dayal v. State of U.P.* [(1978) 2 SCC 518 : 1978 SCC (Cri) 311] while expressing his views about the careful exercise of its power by the court has stated: (SCC pp. 524 and 526, paras 12 and 16)

“It is true that under Section 540 of the Criminal Procedure Code the High Court has got very wide powers to examine any witness it likes for the just decision of the case, but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise

The words, “just decision of the case” would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play.”

20. In *State of W.B. v. Tulsidas Mundhra* [1963 Supp 1 SCR 1 : (1963) 2 SCJ 204, 207 : (1964) 1 Cri LJ 443] , it has observed: (SCR pp. 8-9)

“It would be noticed that this section confers on criminal courts very wide powers. It is no doubt for the court to consider whether its power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person

already examined is essential to the just decision of the case, it is its duty to take such evidence. The exercise of the power conferred by Section 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case.”

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(underlining supplied)

13. It is thus settled that the Trial Court has the power to summon any person as a witness, if his evidence appears to it to be essential to the just decision of the case. This power to summon, recall or re-examine any witness can be exercised at any stage of the trial proceedings.

14. What is necessary for the Trial Court to examine is; as to whether the testimony of the witness is essential to the just decision of the case. If the Trial Court comes to a conclusion that the testimony of the witness is essential to the just decision of the case, it is obligatory, under Section 311 Cr.P.C., on the court to summon such a witness and examine him.

15. In the present case, the allegation of the petitioner is that there is evidence to show that the petitioner has been falsely implicated and that some of the witnesses have been falsely planted by the family of the deceased to falsely implicate the petitioner. Petitioner relies upon the recorded conversation between Saurabh Goyal, the brother of the deceased and the mother of the petitioner, wherein he is alleged to

have threatened the mother of the petitioner and asked her to make the petitioner depose against the co-accused – else he would be falsely implicated. It is further alleged that if the petitioner were to go against the co-accused, the planted witnesses would change their statement and exonerate the petitioner.

16. Without commenting on the admissibility, genuineness, veracity or merits of the recorded conversation, it cannot be held that if such a conversation had taken place between the brother of the deceased and the mother of the petitioner, it would not have a bearing on the case, on the other hand if such a conversation did take place, the same would certainly have a bearing on the just decision of the case.

17. The trial Court, in the impugned order, has not held that the testimony of Saurabh Goyal is not essential to the just decision of the case but has rejected the application holding that the petitioner can summon him as a defence witness. Clearly, in the face of the allegations against Saurabh Goyal, he cannot be summoned by the petitioner as a defence witness.

18. The prosecution, having cited him as a prosecution witness and thereafter having dropped him, cannot be forced to produce him as a prosecution witness. The only course left is to exercise powers under section 311 Cr.P.C. and summon said Saurabh Goyal as a court witness. No prejudice would be caused to the prosecution, if sufficient

opportunity is granted to the prosecution to rebut any evidence that may come on record.

19. In view of the above, the petition is allowed, impugned order dated 05.03.2018 is set aside. Trial Court is directed to summon Saurabh Goyal as a court witness and thereafter afford an opportunity to the petitioner to confront him with the alleged recorded conversation, in accordance with law. The prosecution shall also be afforded opportunity to rebut the same.

20. It is clarified that this court has not expressed any opinion on the admissibility, genuineness, veracity or merits of the recorded conversation. The petitioner would be required to establish the same in accordance with law.

21. The petition is disposed of in the above terms.

SANJEEV SACHDEVA, J

July 02, 2018

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