

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.2236 of 2019

Edwin Enrique

... Petitioner

Vs.

State represented by
Intelligence Officer,
NCB, Chennai

...Respondent

PRAYER:

Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records pertaining dismissal order in Crl.M.P.No.627 of 2018 in C.C.No.67 of 2015, dated 14.11.2018 on the file of Hon'ble 1st Additional Special Judge for the Exclusive Trial of NDPS Act Cases and set aside the same and permit the petitioner to recall PW1, PW2 and PW4 for the purpose of further cross examination.

For Petitioner : Mr.S.Xavier Felix

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor
for NCB cases

ORDER

This Criminal Original Petition has been filed challenging the order passed in Crl.M.P.No.627 of 2018 in C.C.No.67 of 2015 dated 14.11.2018 on the file of the learned I Additional Special Judge for the exclusive trial of NDPS Act Cases thereby dismissing the application filed by the petitioner under Section 311 Cr.P.C. to recall PW1, 2 and 4 for cross examination.

2. Mr.S.Xavier Felix, the learned counsel for the petitioner submitted that the petitioner is the sole accused in C.C.No.67 of 2015 having been taken cognizance for the offence under Section 8(c) r/w Section 21 (c), 23(c), 28 & 29 of NDPS Act. He has been confined to Central Prison, Puzhal-II, Chennai as under Trial Remand Prisoner. He further submitted that the

petitioner engaged new counsel and he had entered appearance only on 01.03.2018. During such time PW1 to PW4 except PW3 had already been examined by the erstwhile counsel. Therefore the new counsel on record found so many new points for cross examination. Since the charge as against the petitioner is serious in nature, the petitioner has to defend in full fledged manner and as such he is to be given one more opportunity to cross examine the prosecution witnesss. He further submitted that the trial is not at all delayed by the petitioner and only because of the prosecution to produce witness into box there is a delay. In fact, the case has been adjourned from 01.03.2018 to April 2018. Even then, the prosecution failed to produce Investigation Officer PW5 for examination. Therefore, he sought for allowing the petition under Section 311 Cr.P.C. to cross examine PW1, 2 and 4. In this regard, the learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court of India rendered in Crl.A.No.709 of 2013 in the case of Natasha Singh Vs. CBI(State) wherein it is held as follows:

"11. In Rajendra Prasad v. Narcotic Cell through its Officer-in- Charge, Delhi, AIR 1999 SC 2292, this Court considered a similar issue and held as under:-
"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better." (Emphasis added)

12. Similarly, in P. Sanjeeva Rao v. State of A.P., AIR 2012 SC 2242, this Court examined the scope of the provisions of Section 311 Cr.P.C. and held as under:-

"Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430. The following passage is in this regard apposite:

`In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers

in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old.... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

3. Per contra, Mr.N.P.Kumar, Special Public Prosecutor for NCB cases submitted that the petitioner is the sole accused and he is the Colombian National. He further submitted that PW1, 2 and 4 were already cross examined by the earlier counsel on record on behalf of the petitioner elaborately and he cross examined for four days only PW1. He further submitted that the change of counsel is not a ground for recalling the witnesses for further cross examination. It is nothing but harassment of witnesses and also to drag the entire case. Therefore, he prayed for dismissal of this petition. He also relied upon the judgment of the Hon'ble Supreme Court of India rendered in the case of State of Haryana Vs. Ram Mehar and Others etc reported in (2016) 8 SCC 762, wherein it is held as follows:

"37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in- chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give

special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High

Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance."

4. Heard, Mr.S.Xavier Felix, the learned counsel for the petitioner and Mr.N.P.Kumar, Special Public Prosecutor for NCB cases appearing for the respondent.

5. The petitioner is the sole accused charged for the offences under Section 8(c) r/w Section 21 (c), 23(c), 28 & 29 of NDPS Act . The prosecution witness was closed by the respondent and they examined PW1 to PW5. Except PW3, PW1 to PW4 witnesses have been cross examined by the petitioner's earlier counsel on record. It is also seen that the new counsel for the petitioner filed vakalat as early as on 01.03.2018. The petition to recall PW1 to PW4 was filed only on 06.09.2018. It is also seen that the petitioner was given several opportunities to cross examine each and every witness of prosecution. The earlier counsel on record for the petitioner cross examined PW1, 2 and 4 elaborately and it runs more than 10 pages. The case is pending from the year 2015 onwards and in fact, the petitioner is in judicial custody. Since the petitioner already cross examined PW1, 2 and 4, the trial court dismissed the petition with regard to PW1, 2 and 4 and the petitioner has been permitted to cross examine PW3 alone on deposit of a sum of Rs.2,000/- as initial batta.

6. The Hon'ble Supreme Court of India has also held in the

case of State of Haryana Vs. Ram Mehar and Others etc reported in (2016) 8 SCC 762 that recall of a witness cannot be allowed for the asking or reasons related to mere convenience, and change of counsel cannot be a ground for recall. Therefore, the trial court rightly dismissed the petition filed by the petitioner in respect of PW1, 2 and 4 and as such this Court finds no illegality or infirmity in the order passed by the trial court. Therefore, nothing warrants to interfere with the order passed by the trial court.

7. In view of the above discussions, this Criminal Original Petition is dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Intelligence Officer,
NCB, Chennai
2. The I Additional Special Judge
for the Exclusive Trial of NDPS Act Cases,
Chennai.
3. The Special Public Prosecutor
for NCB cases

+1cc to Mr.S.Xavier Felix, Advocate, S.R.No.29319

Cr1.O.P.No.2236 of 2019

VP(CO)
CS/15/04/2019

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